AMERICAN ADDRESSES AT THE SECOND HAGUE PEACE CONFERENCE

DELIVERED BY

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EDITED WITH INTRODUCTORY NOTES

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PREFACE

The following collection consists of addresses delivered by three members of the American delegation to the Second Hague Peace Conference, dealing with the subjects of the immunity of unoffending private property of the enemy upon the high seas, the limitation of force in the collection of contract debts, arbitration, an international prize court, and the project for the establishment of a permanent court of arbitral justice, composed of judges acting under a sense of judicial responsibility and representing the various languages and systems of law. General in their nature, it is believed that the publication of these addresses may be of some interest, if not of permanent value.

It has been deemed advisable to include, by way of introduction, an address delivered by each of the three members upon the conference and the results actually achieved by it. A brief note on formal and informal addresses at The Hague has been prefixed, and, where considered necessary to the understanding of the addresses proper, a brief introductory note has been supplied.

An appendix has been added, containing the texts discussed in the various addresses.

JAMES BROWN SCOTT

WASHINGTON, D.C.,
October 18, 1909

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INTRODUCTION

I. NOTE ON FORMAL AND INFORMAL ADDRESSES AT THE CONFERENCE[1]

It may be interesting to consider briefly the character of the addresses made at the conference, in order that a clearer idea may be gained of the assembly, and of the manner in which projects were presented and justified, — indeed forced upon the attention of the delegates. The reglement provided that projects should be presented to the conference, printed, and distributed, before they were discussed, and this rule was adhered to. Amendments were indeed presented and accepted in the course of the sessions, but discussion did not take place upon original propositions until they had been printed and distributed to the members. The addresses, therefore, would naturally fall into two classes: first, formal and carefully prepared orations, in the nature of essays; and second, unprepared and impromptu speeches delivered in the course of debate, either upon an original proposition, a proposed amendment, or a criticism of the subject under immediate discussion. The formal addresses were read from written copies, such as the opening addresses of the Dutch minister of foreign affairs and of the president of the conference. The various chairmen usually read their addresses, although that was not the case with M. de Martens, who spoke freely and without notes. The remarkable addresses of Baron Marschall von Bieberstein, in which he rejected arbitration with reserves, but promised to consider *sans parti pris* the arbitration of carefully selected lists of subjects, and his later address opposing the carefully devised and acceptable project of certain specified subjects, were documents prepared with great care and read from manuscript. Mr. Choate's elaborate argument for the immunity from capture of unoffending private property of the enemy upon the high seas was likewise read. The admirable address of General Porter upon the limitation of force in the collection of contract debts was a set speech,

[1] Reprinted from Scott's *Hague Peace Conferences of 1899 and 1907*, Vol. I, pp. 173–179.

although the first part of it was delivered without notes. Dr. Drago read his various addresses, and the same is true of M. Barbosa, although his unpremeditated reply to M. de Martens's criticism of a previous address as savoring of politics was, in the opinion of many, not only M. Barbosa's masterpiece, but was a model of parliamentary debate. From the many set addresses delivered at the conference, I take the liberty of quoting in full the address of M. Larreta, on the International Court of Prize, which is not only a model in itself, but expresses the attitude of a newcomer in an international conference. It was so frequently interrupted by applause, and was so thoroughly enjoyed by the conference, that its selection as a type of the formal address can hardly be said to be a personal matter:

The Argentine delegation will unreservedly vote for the project drawn up by the Committee of Examination, but we must first set forth the reasons for which we acquiesce.

We believe that the prize court will represent an important step forward for the double fact that it will superpose, so to speak, the awards of an impartial tribunal upon the more or less interested appreciations of the belligerents, and that in addition it will be the first international jurisdiction created by the civilized world. I will even add that in our opinion a court of this nature becomes at this time not only a desirable progress, but also an indispensable institution.

The conference is engaged in establishing the legislation of maritime warfare after ascertaining and determining some points of contact, that is to say, the principles and interest which, in this respect, are common to all the civilized nations. I am well aware that we should not go very far yet on the path that has been opened to us. Just as we do not think of modifying in a fortnight our warlike civilization, we will not draw up the final code of maritime warfare in the course of this conference. But the principles here established will none the less mean a marked advance over those of the Paris congress, which still prevail in the matter.

It is true that all legislation demands a court for its enforcement, if I may be permitted to condense in this phrase the eloquent speech of his Excellency M. Bourgeois on compulsory arbitration. On the other hand, the converse proposition is no less true. Every court must needs lean on precise legislation. This is why I venture to predict that when the prize court is once created all the signatory states will take it to heart to concert for the purpose of completing maritime-warfare legislation and supplying its deficiencies.

I have nothing more to say on this question, especially after the statement laid before the commission by its eminent reporter. But knowing that the great difficulty met by the Committee of Examination was in regard to the mode of organization of the tribunal, I wish to offer some declarations in this respect.

When the question was about the permanent court of arbitration my colleague, his Excellency M. Saenz Peña, declared that in his opinion the best basis of

representation for each country was found in its aggregate foreign trade. We believe, indeed, that when one criterion is considered there is none better for the appreciation of the comparative capacity of the states from an international standpoint. But we also know that this criterion is not any more essentially absolute than mathematically accurate. As a matter of fact, all statistics are inaccurate, as much on account of the imperfect methods used as by reason of the patriotic sentiment which induces the statisticians to increase the figures in favor of their country. It would thus be well in seeking to establish the representative coefficient of each nation to complete the data of foreign trade taken as a basis with those taken from population, military and naval power, length of seacoast and land boundary, not only of the country itself, but of the neighboring countries; in fine, with all the physical and moral factors which enhance or restrict the relative influence of nations.

For the present, and as an approximate solution, we shall consider it sufficient, according to the declarations made by his Excellency M. Lammasch, that in framing the present project the tonnage of merchant vessels, as well as the power of war vessels, shall have been taken into consideration, besides the amount of foreign trade. We accept the position assigned to the Argentine Republic in the apportionment of judges, not only because we believe in the good faith which determined it, and which in fact is not far from the truth, but also because we have looked upon the project not so much as a problem in arithmetic as an institution of confidence and harmony. (Applause.)

The Argentine Republic may have been entitled to a higher rank. We now lead the whole world in the export of cereals. Our annual foreign trade represents over five hundred francs per capita, the highest figure known; and again our navy exceeds eighty thousand tons, which is a high figure for a state of the South American continent. But, granting that some error may have crept into the appreciation of our relative importance, and that we may be entitled to a slightly longer representation than that assigned to us, this is a small sacrifice which we readily agree to in homage to this great endeavor of law and equity. (Applause.)

However, gentlemen, patriotism is still stronger than the love of peace, and I need not say that while examining the project, we never for an instant lost sight of the interests of our country. In my opinion, these interests find a complete safeguard in the Swedish proposition adopted by the Committee of Examination. Each belligerent will always have a judge. We consider this sufficient, for if we should be involved in war, if so great a calamity ever befall our country, we should then hold in the prize court the same status as the other belligerent; we should all be equal before law and equity. I mean enjoying the same equality which is inseparable from sovereignty.

And since I have uttered the word, permit me to add that while spontaneously accepting this convention we will put forth in the most striking manner the unrestricted sovereignty enjoyed by the Argentine Republic. This is what brought us here; to coöperate without humility but without pride in the endeavor of universal justice. Without humility, but without pride, for while we highly

appreciate the honor of sitting in this assembly, we have in return, by being present, given it the splendor and the power of a world's meeting.[1] (Applause.)

Turning now to the less formal addresses, it may be said that Mr. Choate was peculiarly happy in his extemporaneous remarks, which, although delivered in English, were understood by a large part of the audience, and which, in translated form, were admired by all. His remarks on the prize court resulted in the establishment of that institution, and although later reduced to writing, they were delivered without notes, in that happy, offhand manner born of familiarity with the court. In ready and incisive speech in the nature of a parliamentary debate, no member shone with greater luster than M. Bourgeois and Baron Marschall von Bieberstein, who, in a few trenchant phrases, laid bare the argument of his opponent and subjected it to ridicule, if he did not wholly discredit it. In the latter days of the conference M. Renault displayed marvelous and unexpected readiness and aptitude in debate, and his replies to Baron Marschall von Bieberstein's arguments against arbitration are, perhaps, the best unpremeditated debating addresses of the conference. The president, amid the applause of the conference, stated that addresses would be limited to ten minutes, but this regulation was "more honored in the breach than the observance." Mr. Choate's argument in favor of the immunity of private property occupied more than an hour in its delivery, and in this respect at least M. Barbosa followed in the footsteps of Mr. Choate, for if no one address exceeded this limit, several of M. Barbosa's approached it. But these lengthy addresses were interspersed with shorter and sprightlier ones, and the element of humor was not absent. For example, Mr. Choate said, in replying to Marschall von Bieberstein's platonic devotion to arbitration:

I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the conference. But with all this deference, it seems to me that either there are, in this conference, two First Delegates of Germany or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer

[1] *La Deuxième Conférence Internationale de la Paix* (1st Commission, 2d session, September 10, 1907), Vol. II, pp. 13–15.

of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall and will have nothing to do with her.

General Porter's single sentence in reply to Lord Reay of the British delegation — Depuis la politique démodé de Marcy, le gouvernement des États-Unis a acquis de l'expérience et préfère aujourd'hui la politique plus moderne de Roosevelt[1] — was as effective and more pointed than an elaborate reply.

A couple of incidents, taken respectively from the first and second conferences, as well as a single unofficial utterance, will show the humor both within and without the conference, and suggests, if it does not prove, that sprightliness is not inconsistent with gravity and enterprises of great pith and moment. The first is taken from Mr. White's *Autobiography*.[2]

Count Zanini, the Italian minister and delegate here, gave me a comical account of two speeches in the session of the first section this morning; one being by a delegate from Persia, Mirza Riza Khan, who is minister at St. Petersburg. His Persian Excellency waxed eloquent over the noble qualities of the emperor of Russia, and especially over his sincerity as shown by the fact that when his Excellency tumbled from his horse at a review his Majesty sent twice to inquire after his health. The whole effect upon the conference was to provoke roars of laughter.

The humor of the incident was enhanced by the fact that his Persian Excellency was utterly unconscious of the absurdity of the situation. The second incident is set forth by Mr. John W. Foster, who, as a member of the Chinese delegation, is most competent to pass upon the qualifications of his colleague.

The military delegate of China established a great reputation as a wit, notwithstanding he was one of the most serious-minded of the members and never consciously attempted a joke. While the subject of the formal proclamation of war was under consideration he asked the commission what should happen when one

[1] It is impossible adequately to translate General Porter's happy French, but a literal rendering of it is as follows: "Since the old-fashioned policy of Marcy the government of the United States has gained experience and now prefers the more modern policy of Roosevelt." — *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (4th Commission, 9th session), Vol. III, p. 875.

[2] Vol. II, p. 321.

nation declared war against another if the latter did not wish to fight. At another session, when the same subject was under discussion, he stated that he regarded it as important that the conference should define accurately what constituted a state of war, "for," said he, "my country has had its navy destroyed, its ports bombarded, and its capital occupied by foreign troops, when the perpetrating nations declared their acts not war, but only *expeditions*," referring to the French hostilities of 1885 and the allied occupation of Pekin in 1900. The only answer he received to his inquiries from the commission was a hearty laugh from the delegates, who regarded them as sallies of wit or sarcasm on the part of the celestial member.

The last specimen is taken from Dr. White's *Autobiography*,[1] and narrates an experience with the first conference which might be matched by others, only less interesting, from the second. Under date of June 4, 1899, Mr. White says:

We have just had an experience which "adds to the gayety of nations." Some days since, representatives of what is called "The Young Turkish Party" appeared and asked to be heard. They received, generally, the cold shoulder, mainly because the internal condition of Turkey is not one of the things which the conference was asked to discuss; but also because there is a suspicion that these "Young Turks" are enabled to live in luxury at Paris by blackmailing the Sultan, and that their zeal for reform becomes fervid whenever their funds run low, and cools whenever a remittance comes from the Bosporus. But at last some of us decided to give them a hearing informally, the main object being to get rid of them. At the time appointed the delegation appeared in evening dress, and, having been ushered into the room, the spokesman began as follows, very impressively: "Your Excellencies, ve are ze Young Turkeys."

This was too much for most of us, and I think that, during our whole stay at The Hague thus far, we have never undertaken anything more difficult, physically, than to keep our faces straight during the harangue which followed.

[1] Vol. II, p. 288.

II. PROGRESS AT THE SECOND HAGUE CONFERENCE[1]

As I have spent a very considerable portion of the year since we last met in service at The Hague Conference, it seemed to me that it might not be out of order for me to explain to you, briefly, some of the things that were done there that tend toward the improvement of international law.

I am moved to do this because of the general disposition in the press of this country and of England to belittle and depreciate the work that was done there, and this, I think, has led to a very general notion that nothing was done. Because we did not do everything, they decided that we did nothing; because we did not carry every proposition, which a major portion of the conference desired, they thought what we did carry was of no account whatever.

I do not know how it was that a very important part of the English press, particularly the conservative press, was very much disinclined to favor the work of the convention because of some political mysteries that we at this distance are not permitted to see through and have nothing to do with; and the London *Times* was especially hostile to the whole performance, constantly uttering severe criticisms upon what was done or not done, and finally openly setting us down as largely composed of a group of second-class diplomatists who were trying to see how we could best dupe each other. Let me give you its own words to show how reckless and unfair its criticisms were. On the seventh of October it said: "They [the members] have negotiated and compromised and tried to dupe each other and resorted to all the little tricks and devices of second-class diplomacy"; and again, on the nineteenth of October:

> In plain English the conference was a sham, and has brought forth a progeny of shams, because it was founded on a sham. We do not believe that any

[1] An address delivered at the thirty-first annual meeting of the New York State Bar Association, held at the city of New York, January 24–25, 1908, by Joseph H. Choate, president of the association.

progress whatever in the cause of peace or in the mitigation of the evils of war can be accomplished by a repetition of the strange and humiliating performance which has just ended.

As a matter of fact, a great deal was done, but you will understand that it was a conference and not a parliament or a congress.

We met, as Franklin said in the Federal Convention when they began their discussions there, "to confer and not to contend," and there was very little in the way of contest in the conference at all. There was very elaborate discussion which lasted for four months, and instead of being such a body of men as was represented by the London *Times*, it was one of the most able and earnest assemblies of men of whom I have any knowledge. Not only were the great powers, so called, well represented, but the small powers were represented in many cases by very able and interesting men. It was at a moment of profound and universal peace, which was a good augury for the work of the conference; and it was the first time in the history of the world that all the nations of the world substantially, because I believe Nigeria and Abyssinia were about the only absentees, — it was the first time in the history of the world that there had been a conference of all the nations that compose it, that is, all the civilized nations that compose it. One would have expected in such an assembly, gathered from all parts of the earth, — all the nations with their various grades of civilization, — to find more or less rough customers, but in truth it was not so. Even the smallest nations were represented by cultivated, educated, able men, who took their share in the earnest work of the conference.

As you know, international law only proceeds step by step very gradually. It has taken several hundred years to bring it to its present imperfect and really undeveloped condition, and it will probably take a good many more conferences, and I do not know but a hundred years more, before a body of international law is developed to which all the nations of the earth will give their assent. But the way to measure the work that was done at the conference is, in regard to each question, as it seems to me, to consider the position in which it stood when the conference came together and the position which it occupied when the work of the conference was finished. Measured by that standard, I do not hesitate to say that on several very important questions there were advances made, — most substantial progress, which is

not to be taken back and which will by and by secure for each of the propositions that were advocated, whether they were finally adopted or not, an assured place in future history. I have not time in an address like this to go at length into any of these questions, but to show that real progress was made, and that in several instances steps were taken which advanced the science of international law, I do not think I can do better than to take up one by one the projects that were considered, those that were adopted, and three or four of those which were left for future and further consideration by the nations, either by diplomatic interchange of views or by future conference.

In the first place, one great measure upon which all the nations of the earth did absolutely agree without any reservation was the establishment of an international court of appeal in prize cases. This was one of the most interesting subjects that was brought before us, and one to which all the nations great and small gave their assent, so that if their action is ratified by their respective governments the result will be that we shall have for the first time in history an international court, upheld by all nations, for the settlement of a certain class of disputed questions among them. The project was brought forward simultaneously by Germany and Great Britain, whose representatives were both very zealous for its accomplishment; but they looked at it from very different points of view. We gave our general assent to the proposition at the outset and waited to see what would result from the differences that manifestly existed between the two great nations that had brought the project forward. They both agreed that there ought to be an appeal from the prize adjudication of national courts to an international tribunal, which would substitute the rules of international law or the general principles of justice for the selfish adjudication of the national courts. I do not need to tell a body of lawyers like this that it is the general rule for the national courts, being the courts of belligerents engaged in hot and active conflict at the time, to decide all prize cases in favor of the captors, and that has been to the very great detriment of neutrals and of neutral commerce, and I think no nation at one time suffered more seriously than we did from it. You remember the terrible warfare that was waged upon neutral commerce in the early part of the last century, when a conflict existed between Great Britain and France, we being the victim of very serious spoliation by the capture of our

innocent and unoffending neutral ships by both nations ; and so from that time to this I think generally it will be found, without any adverse criticism upon the spirit of justice of any of the nations, that generally prize courts are strongly disposed to decide in favor of their own captors. So that the interest of the neutrals which we professed to represent, and I believe did thoroughly represent, at the conference, was that there should be such a court established.

After a special committee to whom it had been referred had brought in their report, it appeared manifest that there were very serious differences between the German representatives and the English representatives, both of whom wanted the same thing in agreeing upon the scheme for the establishment of the court; and Sir Edward Fry, the chief delegate of Great Britain, when this report was brought in, announced that he could make no further argument, — that argument on their part had done all it could, and that there were three or four serious points of difference between them. Germany was very desirous that the appeal should be from the court of first instance in the national tribunals; England, priding herself so justly upon the great record that Lord Stowell and other of the great admiralty and prize judges of England had made, was very desirous that it should be from the court of last resort only. Then one of these contestants was in favor of the appeal being taken not by the owner of the captured property, but by the nation to which such owner belonged. A third very serious point of difference between them was as to the composition of the court. England, with that natural instinct for law that the Anglo-Saxon races have, insisted that the judges should be pure jurists. Germany, on the other hand, very stoutly contended that the court should be made up in part, at any rate, of admirals, believing that, in a question of prize law, admirals would be the wisest and the safest judges.

It was at this point that we intervened and proposed that there should be a compromise upon each of the several questions that were thus brought in issue, in the hope that all might agree upon the establishment of the court. In respect to the question from which national court an appeal to the International Court should be taken, we suggested that it should be from the court not of first instance, but of second instance, in the national tribunals. That would save the decision of our own Supreme Court, and yet would not expose us to the

possibility of what might prove to be here unpopular, an appeal on any terms or conditions which would dispense with a decision by the Supreme Court of the United States. There were, in the British jurisdiction, some cases where there were three appeals, I believe, in cases that arose in the colonies, and after a very close and active discussion of the matter the middle ground that we proposed was accepted by both the contending parties.

Then, in respect to the question whether the appeal should be taken by the captor or by his government, we proposed it should be taken by the captor always, because his interest seemed to be specially and primarily affected, but that it should be taken by him under general regulations to be established by his government, and that middle ground was adopted by the conference.

Then as to the composition of the court. Of course our prejudices, our judgments, were very strongly with our British brethren on that subject; and our instructions were very strong, as you might suppose when you know that they were prepared by Mr. Root, that courts should be courts and made up of lawyers and judges. Well, finally, what we proposed was, that although admirals should not be made judges, although the judges should be always lawyers, jurists learned in the law, that nevertheless, somewhat after the fashion of the English Court of Admiralty bringing in the Trinity Masters for advice, no case should be decided without a naval representative of each of the contesting parties being present to advise the court, occupying seats a little lower than the judiciary; but that no cases should be decided until the naval representatives had been fully heard and their views completely understood. The German representatives came to see that this middle ground was a wise and prudent mode of settling the difficulty, and the result was that Germany, Great Britain, and the United States and France agreed jointly to be the sponsors for the measure. It was brought again before the commission that had charge of the question and was unanimously recommended by it and was finally, in the same unanimous way, adopted by the conference; and so it has gone to all the nations to be ratified and the court itself was established so far as it was possible for the conference to establish it; I mean to say that the mode of establishing the court was finally decided. It was well understood that eight great nations were more interested in questions of war and questions of prize than the other nations, and as

there were forty-five nations in all and it was not possible for each to have a judge all the time, it was proposed that there should be a court of fifteen judges, nine of whom should be a quorum; that the eight great nations should each have one all the time, and forming the court for a series of twelve years; each of the other nations, according to the interest that it would probably have in the business of the court, its population, its wealth, its activity, its commerce, should have judges appointed by themselves, but to serve only for a graded number of years, — from eleven years down to one year, as in the case of Panama.

Now, that may be regarded as an accomplished fact,—the establishment for the first time of an international court to whose judgments all the nations agree to bow,—and for one I am firm in the opinion and absolute in the claim that, so far as an addition to international law is concerned, it was a very great advance.

The next question upon which the conference did absolutely and entirely agree was the question of the resort to force for the collection against nations of contractual debts claimed to be due to the subjects or citizens of other nations. That, you know, has been a very serious source of controversy in previous years. Sometimes nations have almost come to blows and very bitter feelings have been excited by a resort to force by creditor nations even for contractual debts against nations who were unwilling or unable to pay. That proposition, very ably introduced under the guidance and conduct of General Porter, was to the effect that force should not be resorted to for the collection of contractual debts against one nation claimed to be due to the citizens of another until arbitration had been proposed and carried through and disobeyed, or proposed and refused on the part of the other nations. That is of very great value. It had no special reference to the South American nations. It applies alike in all its terms to all the nations, great and small, and it puts a barrier of arbitration to prevent war on a great range of subjects for which there has been a disposition in the past either to go to war or to threaten war.

I might remind you in a single word of the situation of the Monroe Doctrine and of the relation of this proposition to it. This proposition, which, as I have stated, was unanimously agreed to by the conference, has no special bearing upon the Monroe Doctrine, but there is this to say of it, that it is an approach to and recognition by all the nations of the law of "hands off" against weak nations on the part of strong

until they have had a chance for the intervention of arbitration. The Monroe Doctrine is our peculiar, favored doctrine,—that there shall be no occupation of American soil by foreign nations, and no attempt on their part to extend their system to any portion of this hemisphere; but it has never been assented to, that I know of, in any definite form, in any treaty form by any of the nations great or small. It is treated with very great politeness, and more and more as we advance in strength. Our present President has said, and very properly said, that that doctrine, for its maintenance, depends upon our ability to maintain as well as to assert it; that it will keep good as long as we are strong enough to make it good. There is no doubt that as our power grows and our navy grows it will be treated with more and more politeness and deference, and although foreign nations may not agree to it, may not give a formal assent to it, they will not disregard it. I remember that even as long ago as when Lord Salisbury was prime minister and foreign secretary he always spoke of it with the greatest respect, and so I think you will find that the chief representatives of government of all the foreign nations will treat it more and more politely and deferentially as time goes on. It will tend very much, of course, to keep the peace of the world. But here in this proposition that I have now referred to, which was unanimously adopted, we have all the nations, great and small, agreeing that in that one case of contractual debts, claimed to be due by one nation to the citizens of another, force shall not be resorted to until arbitration has been tried. I think that is another great step forward towards the establishment of rules of international law on a very important subject.

Those were the two great questions that were unanimously adopted by the conference. There was a general feeling that absolute unanimity, or at least approximate unanimity, was necessary for the adoption of any question. We might have a great majority on many questions, but if we undertook, as they do in Parliament or Congress and in our legislatures, to force a question through by majority, I think it would be an end of these international conferences which proceed on the basis of general assent and conviction. So I want to speak to you of three or four other matters that were proposed and were not adopted by the conference, but in which great progress was made. One was the matter of the immunity of enemies' private property at sea, immunity of enemies' private property in enemies' bottom at sea

in time of war. We were instructed by our government to maintain that doctrine to the best of our ability. You know that it has been a favorite American doctrine since Franklin's time in the negotiation of the treaty of peace with Great Britain in 1783 by which our independence was recognized. Franklin endeavored to have it inserted as a substantial clause in the treaty, that private property, in case war broke out between the two countries again, enemies' private property in enemies' bottoms, should be exempt from capture; that is to say, that was a move in a very important direction of saving commerce—inoffensive, unoffending commerce—from spoliation and destruction in case of war. It was very much for the benefit of the world at large. It was to make commerce free always from the ravages of war. Look at any of the great nations now which are prosecuting a successful commerce and see what a difference this exemption would make to all of them. Our government had pressed it time and again during the intervening hundred years between Franklin's death and the meeting of this conference. They had proposed it at the first conference and it had been absolutely excluded. The conference would not listen to it; they said it was not within the programme, although so far as a careful study goes it seemed to be quite as much within the programme as some of the doctrines that were considered by that conference. We had got it inserted by Franklin himself in the treaty with Prussia; once we had it in a treaty with Italy; and several times other nations, imitating that example when war broke out between them, agreed at the outbreak that there should be such immunity. That is the way the question stood at the time this conference met. No substantial progress had been made toward establishing it as an international doctrine, although we had been advocating it for over a hundred years. Well, we brought forward the proposition. Of course most of the great nations opposed it. Germany was the only one of the great fighting nations that voted affirmatively with us, but it was very respectfully considered. It was made a subject of discussion, very earnest on both sides, which lasted through several weeks, and finally, when a vote was taken in the conference, two thirds of the nations, voting by a vote of twenty-two to eleven, recorded their votes in favor of the establishment of such immunity. It was not possible, however, in the face of great commercial nations that opposed it,—nations likely at any time to be engaged in war,—to press it further. We were

instructed never to press anything to the point of irritation, but if we found that it was not possible to carry a thing through by general consent, then we were to carry it as far as we could and drop it and leave it for further consideration, in the hope that by and by, by the growing sense of the nations, it would be accepted. So there was a question by which two thirds of the nations interested voted for the establishment of the doctrine, which was really the old American doctrine. There it was left, either for these twenty-two nations to agree, as they may agree, to a treaty between themselves for the practical establishment of the doctrine between them in case they engage in war, or for action by a further conference to be held in the course of seven or eight years. So there, as it seems to me, was very great progress made. We do not stand any more where we did at the beginning of the conference, nobody assenting to it but ourselves, but twenty-two nations of greater or less importance pledged to the proposition which makes so strongly for peace.

Then there was the question of a general arbitration agreement. Such an agreement was very earnestly desired by many nations. The instructions we received were to press for a general arbitration agreement substantially in the form of those arbitration agreements which we made with ten nations in 1904, but which came to an unhappy end by a difference between the President and Congress in respect to one of the terms of the treaty. We did not undertake to settle that issue between the President and the Senate, but we offered an agreement which provided that certain questions that did not involve national honor or independence—that were in their nature judicial or involved the interpretation of treaties—should be settled by arbitration; and whenever an agreement was necessary for the settlement of the terms of the arbitration it should be agreed to according to the laws and constitutions of the several nations. This was a very important question to have carried through, and it was not carried through. I am not now speaking of the general court, but the general arbitration agreement. That was debated all the time from the sixteenth of July, when we brought it in, until a few days before the close of the conference. Intense interest was taken in it by all the nations, and it was the one question which became critical, if you believe that any question could be said to be critical, but in respect to which at any rate there were violent differences of opinion. We gained advocates

for it, adherents to the doctrine as the discussion went on; and finally about the first of October, or the fifth of October, — the conference ending on the twentieth of October, — a vote was taken in the first commission which had charge of the subject, and the nations by a vote of more than four to one agreed to the proposition. They agreed that there should be this general scheme for practical arbitration. To be sure, it was in a very limited and restricted form, and even at that we came to a halt. There was apprehension on the part of some of the important nations, in which I did not participate, that a very important member of the conference, a great nation represented in the conference, would withdraw if it was further pressed, against its persistent opposition. Under the spirit of our instructions, although we had no apprehension that the existence of the conference would be disturbed if we did press the subject further, we concluded and claimed that arbitration ought to stand where it was, presented to the world as a doctrine favored by the votes of four nations to one. I think the vote was thirty-two or thirty-three or thirty-four to four, five, or six on the different articles of the proposition that it should stand before the world as a proposition carried to that advanced position with the support of all those nations; but on the whole it was deemed wiser that a somewhat colorless resolution should be adopted, to the effect that we approve of the general principle of arbitration, that there were subjects that ought always to be referred to arbitration, and leaving the question to the future consideration of the nations. We were unwilling to agree to that, because we considered it too decided a retreat from the advanced position which we had already secured for arbitration, so we said, and we abstained from voting on that ground, hoping that it would be left for the thirty-two, thirty-three, or thirty-four nations that had agreed to enter into treaties between themselves according to the tenor of their agreement, leaving it for the others to stay out or come in as they pleased. The whole proposition was from the beginning that no one should be compelled to come into it, and that it should be left open for any afterwards to come in as they pleased. Now, if general arbitration, if the doctrine of arbitration as a substitute for war,—and no other substitute has yet been found among the nations,—is regarded as of value, have we not here made another very great advance by the work of this conference?

Now a word about the general court of arbitration as wholly distinguished from this question of the general treaty of arbitration. We wanted to establish a general court of arbitration something like the prize court, but of much wider scope, to which all nations might resort if they pleased for the settlement of their international disputes. That was a question that interested all the nations alike, and general agreement was come to, in the first place, that there ought to be such a court, whereas in the first conference the idea that there could be such a court was abandoned as impracticable and no action was taken. But the second conference voted that such a court of arbitration ought to be established, and we proceeded to frame, by general consent, a scheme for the functions, the organization, and the procedure of the court to which substantially all agreed. Well, then, where did we fail to agree? Why did we not establish the court? Why, because of the failure to agree upon a method of appointing and creating judges. It was proposed and very earnestly supported by almost all the larger nations who had agreed to what was deemed by all fair and reasonable in respect to the prize court, that there should be a similar distribution of judges according to the interest and business that the several nations would probably bring to the court. Well, there we hit upon an obstacle which there was no overcoming. We were forty-five nations assembled. Central and South America constituted twenty-one nations of all that took part in this second conference, and they claimed and asserted that sovereignty was sovereignty and that all nations are absolutely equal, and although they had assented unanimously to the formation of the international court of appeal in prize, on the terms that I have mentioned, they concluded to make their stand on this, and that there should be nothing short of absolute equality in the appointment of judges. As there could not be a court of forty-five judges, and as Russia and Germany and Great Britain and France could not agree that one nation was as big as another and a great deal bigger, as was claimed by some of these smaller nations, they could not yield the point. We proposed various schemes, being very earnest in the hope of the establishment of this court. We came down to the question of election of judges, and there we were willing to have an election of judges by all the nations, each voting for a limited number of judges. We thought we could take our chances of being represented in that court, and whether we were or not, we

would take our chance of an election because the whole scheme of it was that nobody was compelled to come before the court; they could resort to other modes of settlement of their international differences, and especially to that which is now existing at the Hague Tribunal, which consists of a list of referees really agreed upon for the nations to select from,—two or three or five in case of a difference arising between them,—but it is not, in reality, a permanent court at all. But there was the difference that I have pointed out which was incapable of settlement in the conference. It was therefore voted that there ought to be such a court, that this scheme that we had established for its powers, procedure, its organization, its sessions, and the rules of law that should be applied in it, was accepted, and it was referred to the nations to agree in the best manner they could upon the number of judges and the mode of their selection, and that as soon as that was done the court should be established with the constitution which we had framed for it; and I am happy to say that, in a talk I had with the Secretary of State since our return, he expressed great confidence that it would be practicable to secure an agreement of the nations, by diplomatic methods, upon a mode of electing the judges and so establish the court, and that without waiting for another conference. Now if you can realize that that question was a nonexisting question at the time of the First Conference, and now that, in the Second Conference, the nations, by a vote of four to one, espoused and adopted it, is not that a very great advance?

Then there was another important question upon which all agreed in respect to future conferences. We had hoped to see established some machinery by which automatic action should take place and the conference be called without waiting for the action of any particular nation, and its organization and procedure be in its own hands by means of an executive committee,—an international executive committee to gather the views of the nations some two or three years beforehand, to form a tentative programme for submission to the conference, and to arrange the method of its organization and procedure, and that thus the predominance and control of any particular nation should be avoided. That in a modified form was finally passed.

It was very difficult to get forty-five nations to agree on phraseology, as I might tell you, in respect to a single item of this last proposition. As a mere illustration, we proposed at first that there should be

another conference held in the month of June, 1914, seven years from the time we were sitting, and I advocated that strongly upon the doctrine that seven years is a magical number, being a period during which each man absolutely changes his structure, and the men that would come to it then, even if they were the same men, would be absolutely new men. (Laughter.) That amused the conference, but did not convince them. (Laughter.) It was objected that it was too definite to say the month of June, 1914, and the German representative said he did not want it and would not have it before 1914, and so he proposed that it should be not earlier than 1914; and another nation thought it should not be later than 1914, and finally we proposed to split the difference between them and make it *about* 1914. (Laughter.) When it was brought to the final test of the unanimous approval of all the forty-five First Delegates, even that was considered to be too definite, and so it was put and carried unanimously that another conference should be held at a period analogous to that which had elapsed since the last conference. (Laughter.)

That gives you a little idea of the difficulties we had to contend with in settling the phraseology of that and every other important resolution. We did finally settle it, and it stands resolved that two years before the date, or the probable date, of the meeting of the next conference a preparatory committee — they would not agree to the word "executory committee," but a "preparatory committee" — should be appointed by international action that should gather the views of the nations, prepare a tentative programme, and recommend a scheme for the organization and procedure of the conference. I think that is a very great advance. Friends of peace, friends of arbitration, may now depend upon it that every seven or eight years there will be a similar conference, and that where the last conference left the work unfinished the new conference will take it up, and so progress from time to time be steadily made, and the great effort of the nations to avoid war by the establishment of arbitration and other peaceful methods will in the end be successful. We cannot expect to succeed all at once, or to avoid war altogether, but great progress is being made, and I submit to you if this statement of mine is a fair statement of the action of the conference upon the principal questions which were brought before it, real advances were made towards the desired end, the London *Times* to the contrary notwithstanding. (Applause.)

III. THE SECOND HAGUE CONFERENCE[1]

At the First Hague Peace Conference, in 1899, there were twenty-six countries represented; at the Second, in 1907, there were forty-four, practically all the nations of the earth. The First Conference was in session during ten weeks, the Second seventeen weeks. The meeting in the historic Hall of the Knights on the 15th of June, 1907, in the capital of the land that gave to the world Hugo Grotius, the father of international law, was in some respects the most significant assemblage in the annals of history. It presented for the first time the unique spectacle of delegates representing all nations, all rulers, all colors, all creeds, all forms of government, convening in conference with the avowed purpose of making a sincere and earnest effort in the interest of the world's peace. Rarely, if ever, has there been assembled a more intellectual body, and it is a great satisfaction to record the fact that for more than four months during which the sessions continued not an offensive or irritating word was uttered even in the heat of the most exciting debates, in which there was often expressed a wide divergence of opinion.

While it was most satisfactory to have all the powers represented, yet the increased number of delegates participating greatly prolonged the sessions and made the proceedings more cumbersome. It was one of the prime conditions of the conference that each sovereignty represented should cast one vote. While this rule gave to the smallest states the same voice as the great powers, yet there was no other basis of representation upon which the conference could have been organized.

The public has been fairly well informed of the success achieved by the conference in regard to the establishment, by a practically unanimous vote, of an international prize court; the unanimous adoption of the American proposition prohibiting the employment of armed force for the collection of contractual debts against a nation

[1] From an address delivered before the faculty and students of Harvard University, March 6, 1908, by General Horace Porter, LL.D.

claimed to be due to the subjects or citizens of another nation, unless arbitration shall have been proposed and refused, or carried through and the arbitral award repudiated by the debtor nation; the approval of the American proposition of a well-matured scheme for a permanent international court of arbitral justice, but which cannot be put into operation by the nations until they settle the question of the selection of its judges, — a subject the powers now have under consideration; the securing of a vote of two to one in favor of the American proposition granting immunity from capture at sea of the private property of a belligerent, but which was not adopted, as the conference could be bound only by a practically unanimous vote; the securing of a vote of four to one in the commission to which the question was referred in favor of compulsory international arbitration under certain restrictions, but which did not prevail, for lack of unanimity; the use of impartial commissions of inquiry into the circumstances alleged as the cause of a threatened war; the securing of an agreement that another peace conference shall be held not later than eight years from the Second, and may be called by a committee of the nations instead of by any one power.

The world, however, is not generally informed as to the many beneficent measures adopted by the conference, fixing rules for the amelioration of the hardships, suffering, and losses occasioned by war in case it would arise, and the prescribing of rules and regulations fixing the rights and duties of neutrals and belligerents with a view to preventing them from being drawn into war by a neglect or misconception of their duties towards one another. The following are among the most important of such conventions adopted by the conference: Preventing the throwing of projectiles or explosives from balloons at least until the end of the next conference; prohibition of the use of unanchored submarine mines unless they become harmless within an hour after their control has been lost, and of the use of anchored mines which do not become harmless as soon as they break their cables; also of automobile torpedoes that do not become harmless when they have missed their aim; the prohibition against placing mines along the coast and in front of the ports of the enemy, with the sole purpose of intercepting commerce; agreement that belligerents shall cause mines to become harmless after a limited time by removing them, guarding them, or indicating the dangerous regions;

prohibition against the bombardment of ports, towns, villages, dwellings, or buildings undefended by guns, and against bombardment for the enforcement of a money ransom; prohibition against pillage, even in the case of towns captured by assault; agreement, in case of bombardment by naval forces, to spare sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments and hospitals when they are not used at the same time for military purposes; convention defining the rights and duties of neutrals on land; forbidding belligerents to perform certain acts advantageous to themselves on neutral territory; defining the relations of neutral states towards a belligerent's soldiers, invalids, and wounded; protecting the rights of neutrals residing within belligerent territory; exemption of officers from the rule permitting belligerents to employ their prisoners of war as laborers and compelling their captors to pay them a salary equal to that paid to officers of the same rank in the enemy's army; forbidding a belligerent to compel the population of an occupied territory to give information concerning the army of the other belligerent or its means of defense; protecting the rights of private property in occupied territory by compelling the invader to give receipts for all contributions in kind, which shall be redeemed for money as soon as possible; providing that means of transportation shall not be confiscated by the invader but used only for his military necessities and restored and compensated for upon the conclusion of peace; provision that coast fishing vessels shall not be subject to capture, and that all postal correspondence captured shall be inviolable and forwarded to its destination by the captor with the least delay possible; agreement that hostilities must not begin without warning in the form either of a declaration giving reasons therefor or an ultimatum with conditional declaration of war; the adaptation to naval warfare of the humane principles of the Geneva Convention.

The fact that no provision could be made looking to disarmament or the limitation of armaments by the powers was not unexpected. It was known before the conference convened that some of the powers would not even consent to debate such a question. This was not very surprising, as nations, like individuals, object to abandoning their sole means of defense until some competent, impartial tribunal enjoying their entire confidence is established for the settlement of their differences. In past endeavors there has been an effort to put the cart

before the horse in expecting nations to disarm before a satisfactory international court of justice is established to take the place of force.

The world is greatly indebted to the First Peace Conference for the beneficent work it performed in creating the Hague Tribunal for the purpose of arbitrating the differences of such nations as desire to carry their disputes before it. This tribunal has performed a most useful service, but the work of arbitrators differs from that of a permanent international court of justice. In arbitration certain arbitrators are chosen by the parties to the litigation for the particular case at issue; they are not judges of a permanent court; they receive their compensation from the litigants, are too often inclined to act in a diplomatic rather than a judicial capacity, and their decisions are frequently the result of a compromise which is not satisfactory to either party. Nations having ample power to maintain their contention by force in a dispute object to submit questions seriously affecting them to the decision of mere arbitrators.

The American delegation, therefore, labored zealously to establish a high international court of justice in which the judges would be in a measure permanent, practically disassociated from their respective countries, would receive their compensation from the signatory powers in proportion to their population, would be men accustomed to weighing evidence and known throughout the world for their ripe experience, unimpeachable integrity of character, and acknowledged intellectual capacity. Such a court would, by its able, independent, and impartial decisions, soon win the confidence of the nations, and the codification of its decisions would in time create an international law that would be robbed of its present vagueness and given the quality of recognized validity.

There is reason to believe that nations would be willing to carry their differences before such a court, as they would be confident of impartial decisions based solely upon the actual facts established by the record. It is hoped that such a high international court of justice would in time bear to the different nations a relation akin to that of the United States Supreme Court to the several states of the Union. We trust that the court of justice favored by the Second Peace Conference, the scheme of organization and rules of procedure of which commended it so highly to the delegates there assembled, may be put in operation, as it awaits only the appointment of the

judges, their selection being now a subject of diplomatic correspondence among the signatory powers.

Experience has abundantly shown that then, and not till then, though nations may avoid wars, we cannot look for a substantial reduction of armaments. In the meantime even America, acknowledged as the foremost advocate of peace, in view of her vast seacoast, her important possessions, extending to the antipodes, her position as a world power, her grave responsibility as the protector of our commerce and of our citizens who may be wronged abroad, the guardian of the Panama Canal and the champion of the Monroe Doctrine, will have to maintain an adequate military force lest by her weakness she lose her power of speaking authoritatively in the preservation of the world's peace. This force should be regarded solely as a means of protection and defense. She cannot afford to invite attack by demonstrating her inability to resist it.

When the last conference convened there were many doubting Thomases and pessimistic skeptics who predicted failure and facetiously proclaimed that a peace conference is an assembly in which the delegates discuss the subject of peace during the brief intervals between wars; but their forebodings of defeat have not been realized, and the general belief to-day, on the part of those who have informed themselves on the subject, is that if only one of the thirteen conventions entered into at The Hague had been accomplished it would have been well worth the time and expense devoted to convening the conference.

If a proportionate progress be made at the next conference in turning the minds of statesmen in the direction of amicable settlements of their differences without resorting to the cruel arbitrament of the sword, we may hope to see in the not too distant future the time when statecraft shall be tempered by justice, for "learning without justice is cunning rather than wisdom"; when the science of destruction shall give place to the arts of peace; when the people shall realize that a nation's prosperity depends upon public tranquillity, and that the ink of the scholar is more potent than the blood of the martyr. As an eloquent French statesman said, "At the memorable Hague Peace Conference there were heard, slow, but regular and distinct, the first sympathetic throbbings of the heart of humanity."[1]

[1] Address of M. Léon Bourgeois on the Second Conference of The Hague, delivered before the Interparliamentary Union of France, November 14, 1907.

IV. THE SECOND HAGUE CONFERENCE A PEACE CONFERENCE[1]

The Final Act of the recent Hague conference states the calling of the conference in a single happy paragraph:

> The Second International Peace Conference, first proposed by the President of the United States of America, having been, upon the invitation of his Majesty the Emperor of all the Russias, convoked by her Majesty the Queen of the Netherlands, met the 15th of June, 1907, at The Hague, in the Hall of Knights, charged with the mission to give a further development to those humanitarian principles which served as a basis for the work of the First Conference of 1899.

From this preamble it appears that the Second Peace Conference was initiated by President Roosevelt, although the idea of a conference as an international institution is due to the Czar of Russia. It is therefore not too much to say that the United States and Russia were jointly interested in the conference in a personal and a peculiar way beyond all others, and in the success of the conference they undoubtedly have just cause for satisfaction.

But what is the nature of this Peace Conference proposed by the President of the United States and assembled through the coöperation of Russia and The Netherlands? It is an assembly composed of representatives of the states accepting and applying in their intercourse the principles of international law, and in this assembly each nation represented is considered a unit and votes as a unit, although its delegates may be many or few. While it is, in one sense of the word, a deliberative body, it is not a parliament. Majorities show undoubtedly the trend of international feeling; but each nation, being independent and charged with the preservation of its existence, must judge for itself whether the conclusion of the majority is advantageous or detrimental either to its existence or legitimate interests. The majority may give pause and cause a state in the minority to reconsider its position in order to see whether what the many desire is not also

[1] An address delivered by James Brown Scott at a dinner given by The George Washington University, Washington, D.C., December 21, 1907.

desirable for the few. Majorities therefore exist, but they exercise a moral influence; they do not coerce. At most the decree or resolution of a majority binds the majority; it does not, and under existing conditions it cannot well preclude an individual state.

A conference, then, is a diplomatic assembly, and the members of the conference represent diplomatically their respective nations. It is the nation that speaks, not the individual who expresses an opinion; albeit this individual, by reason of his experience and ability, as well as the confidence which his character inspires, may exert a great personal influence not only in the deliberations but in the conclusions ultimately reached.

As international law is based upon the legal equality of states, it necessarily follows that each state has a vote, and but one vote. But while states are, legally speaking, equal, we know that in the world of affairs they do not possess equal influence. It is an axiom that men are created equal, but we interpret this equality, and properly, as an equality of legal right, as equality before the law. We do not mean that there is not and cannot be a difference in the individual caliber and ability of the man; and just as this man develops himself and acquires influence and standing, so the nation, by husbanding its resources and making a wise use of them, acquires standing and leadership in the family of nations. While, therefore, the conference admits the equality of nations, and while each nation thus responds to the roll call, Montenegro influencing the vote as profoundly as Russia, the conference nevertheless admits that the support of the larger nations is necessary in order to give international force and effect to a proposition before it. For example, the attitude of Great Britain in matters of maritime law is controlling, and the view of Germany on the rights and duties of neutrals in time of war must carry great weight.

The purpose of a conference is to reconcile divergent views, and, by conciliation and renunciation if necessary, to produce substantial agreement. This often means that progressive measures are discarded for more moderate formulas, just as the advanced guard of an army halts that the laggard may catch up; for the purpose is not to secure the assent of the few, but to bind the many, and it is better to make haste slowly than, by an excessive zeal, to make no progress. The result of a conference, therefore, is often strangely at variance with

the programme. The sweeping reforms of the enthusiast are brushed aside and in their place tentative measures, timid measures perhaps, appear; but we must not forget that a step in advance is still a step in advance, and that the failure of to-day is the measure of the morrow.

In order that a conference may be a success nations should not only be willing to accept compromises and act in the spirit of compromise, but they should in advance of the conference decide what interests they may safely renounce in the interest of all, rather than, by a rigid attitude, endeavor to secure international recognition of national interests. The general interests of humanity exceed the interest of any one nation, however powerful, and just as society strips man of his absolute rights as an individual, so the members of the family of nations must be prepared to renounce absolute rights in the interest of international harmony. As our Secretary of State said in his instruction to the American delegation:

> In the discussions upon every question it is important to remember that the object of the conference is agreement and not compulsion. If such conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the powers cannot be expected to send representatives to them. It is important also that the agreements reached shall be genuine and not reluctant; otherwise they will inevitably fail to receive approval when submitted for the ratification of the powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside or refer it to some future conference in the hope that intermediate consideration may dispose of the objections. Upon some questions where an agreement by only a part of the powers represented would in itself be useful, such an agreement may be made, but it should always be with the most unreserved recognition that the other powers withhold their concurrence with equal propriety and right.
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> The immediate result of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress, and, by successive steps, results may be accomplished which have formerly appeared impossible.

But we must not judge a conference by its failures, even although we feel that the very failures open a vista of hope. A conference must be judged by its actual accomplishments. Tried by this criterion, the First Peace Conference justified its calling. It is true that the subject of disarmament met with little encouragement and no success; it is also true that attempts to limit the expenditures for military and naval establishments failed miserably, although these two subjects moved the Czar to call the conference; but this conference, which sat from the eighteenth day of May to the twenty-ninth day of July, 1899, marks the beginning of an era in the world's progress.

The First Conference was preëminently a peace conference, notwithstanding the fact that two of its three conventions dealt with war; for it sought to ameliorate the hardships and sufferings of warfare on land, as well as to apply to naval warfare the generous principles of the Geneva Convention. It did not attempt what would have been impossible, — to abolish warfare. It recognized it as an existing evil and wisely attempted to lessen the evil which it could not eradicate.

While recognizing, however, the possibility of war, the conference set itself seriously to devise measures whereby international difficulties might be settled before nations rush into war, led astray by passion and temporary interest, or drift slowly but surely into a state of actual hostility.

The monument of the conference and its secure title to glory is the convention for the pacific solution of international conflicts, whereby it was provided that nations should use their best efforts to promote and to assure the pacific solution of international difficulties; that they might offer and exercise their good offices and mediation either before or during war, and that the offer of good offices and of mediation should not be considered an unfriendly act. The conference, however, did not stop here. It created two institutions in which facts involved in an international controversy might be found, and in which the controversy itself might be determined as between litigant and litigant in a court of justice.

The first institution was the International Commission of Inquiry, to be established by contending parties in order to substitute for passion and prejudice the impartial and conscientious examination of the facts in controversy by commissioners appointed by each of the contending countries, under the guidance of an umpire chosen by the

commissioners or by a third power designated by the parties to the litigation. I need only call your attention in passing to the findings of the International Commission of Inquiry in the Doggerbank incident, which at one time threatened to embroil Great Britain and Russia in war.

The second institution was the Permanent Court of Arbitration, which consists of not more than four judges, versed in international law, appointed by each signatory of the convention; and from these judges, whose names are entered upon a list and notified to the signatories, a temporary tribunal may be created to pass upon an international difficulty presented to it for consideration. Each party to the controversy chooses, unless another method is specified, two arbiters, and the four so chosen select an umpire. If the arbiters do not agree, a third power is designated by the litigant countries to select the umpire. If the parties do not agree upon this third power, each party litigant chooses a power and the two powers thus chosen select the umpire. The conference adopted a code of procedure for the guidance of the tribunal when thus constituted.

But the framers of the convention were not satisfied with the simple creation of this institution. They believed in arbitration and confessed their faith in Article 16 as follows:

> In questions of a judicial character, and especially in questions regarding the interpretation or application of international treaties or conventions, arbitration is recognized by the signatory powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods.

The nature and importance of these two institutions are evident. The International Commission of Inquiry secured the speedy and impartial ascertainment of facts involved in an acute controversy which might not be delayed without a fear of war. The Permanent Court of Arbitration with its temporary tribunal was meant to supply an international and impartial body before which nations might appear as litigants and settle their controversies by the resort to justice and reason, without the unsatisfactory and brutal appeal to the sword. Four cases have tested the institution and justified its creation.

The First Hague Conference was thus a peace conference. It did its duty well and nobly. It deserved a successor and it had it. Will the Second Conference, which labored for four months,—from June

15 to October 18, 1907, — be equally fortunate? Does it deserve a successor? In the last two paragraphs of the Final Act of the conference this query was answered in the affirmative as follows:

> Lastly, the conference recommends to the powers the holding of a Third Peace Conference, which might take place within a period similar to that which has elapsed since the preceding conference, on a date to be set by joint agreement among the powers; and it draws their attention to the necessity of preparing the labors of that Third Conference sufficiently in advance to have its deliberations follow their course with the requisite authority and speed.
>
> In order to achieve that object, the conference thinks it would be very desirable that a preparatory committee be charged by the governments, about two years before the probable date of the meeting, with the duty of collecting the various propositions to be brought before the conference, to seek out the matters susceptible of an early international settlement, and to prepare a programme which the governments should determine upon early enough to permit of its being thoroughly examined in each country. The committee should further be charged with the duty of proposing a mode of organization and procedure for the conference itself.

Though guarded in language, the meaning of this important recommendation is clear. A conference is to meet at an analogous period, that is to say, eight years hence; the powers, without specifying which or how many, are to agree upon a date sufficiently in advance of the meeting to give time for adequate preparation; a preparatory committee is to be constituted, whose duty it shall be to collect the various propositions to be submitted to the conference, to propose matters susceptible of an early international settlement, and to prepare a programme sufficiently in advance of the conference in order to permit a thorough examination and study, and, finally, the committee is to propose a mode of organization and procedure for the conference.

This recommendation recognizes the fact that in becoming international the conference has ceased to be national, and that therefore, being international, it should be organized and officered by the nations or by committees chosen from among the nations. The conference ceases to be Russian without passing under the domination of any one power, and it is to be hoped that the proposed organization of the conference will emanate not merely from one power, but will be the joint reflection and coöperation of the many. The conference should not be officered by any one nation; it should elect its own officers, and these officers should be its servants, not its masters.

But we cannot accept as final the judgment of the conference upon the value of the work accomplished by it, and the advisability of a Third Conference must depend upon the positive results of the Second and the probability of further progress in the Third. To be called a peace conference its work must make for peace, and a careful examination of the results of the conference must show that the interests of peace were advanced; otherwise the name is a misnomer. We may therefore leave out of detailed consideration the various conventions dealing with the conduct of hostilities upon land or on sea, and the rules and regulations concerning the rights and duties of belligerents and neutrals. But we would be unjust to the conference did we not state that carefully considered conventions were adopted relating to the opening of hostilities; concerning the laws and customs of land warfare (a revision of the convention of 1899), the rights and duties of neutral states and persons in land warfare, the treatment to be accorded enemy merchant vessels at the outbreak of hostilities, the transformation of merchant vessels into vessels of war during hostilities, the laying of submarine automatic contact mines, the bombardment of undefended ports in time of war, the adaptation to naval warfare of the principles of the Geneva Conventions, the restrictions placed upon the exercise of the right of capture in naval warfare, the rights and duties of neutral powers in naval warfare, and the declaration forbidding the throwing of projectiles and explosives from balloons.

These various conventions would in themselves justify the calling of an international conference, but the conference would probably be called a war conference, although many of the provisions, by making that certain which was uncertain and by imposing restrictions in the interests of neutrals, make for peace.

We must examine the Final Act to ascertain what was done to prevent rather than to regulate and restrict war, and such examination discloses the fact that this Second International Peace Conference has, indeed, justified the ways of peace to man. The conventions looking toward the peaceful solution of international difficulties are three in number: first, the convention for the peaceful settlement of international conflicts; second, the convention concerning the recovery of contract debts; and third, the convention establishing an international court of prize. A declaration recognizing the principles of obligatory

arbitration and a recommendation that a court of arbitral justice be established, based upon the project proposed by the conference, look upon peace as at once the normal and permanent state of things. Let us consider each of these in turn.

The Convention for the Pacific Settlement of International Conflicts was but a revision of the masterpiece of the First Conference, but the revision went to the defects and was so thorough that the resulting convention reflects almost as much credit upon the Second as the original convention did upon the First Conference. The conception, however, is the work of the First Conference; its more perfect realization is the work of the Second. The changes are largely changes in detail; the improvements are generally the result of practical experience. The principal addition is a provision for summary procedure in matters of lesser moment.

Let us note some of these changes. The original convention recognized as useful the proffer of good offices or mediation to states in conflict. The modified convention, while proclaiming anew the utility, states that it is desirable that good offices and mediation be offered. It is true, no positive duty is created; but from being useful, the good offices and mediation have become desirable. A moral duty springs into existence, and it cannot be doubted that law will one day give force and effect to the desire of the nations. In the meantime the termination of the Russo-Japanese War, through the good offices of the President of the United States, may well serve as a precedent.

The same remark applies to the modification introduced into the text of Article 9 of the original convention, which declared an International Commission of Inquiry to be useful in ascertaining disputed facts through an impartial and conscientious examination. There is here no legal duty, but there is likewise a precedent, namely the peaceful settlement of the Doggerbank incident by the International Commission of Inquiry created by the First Conference.

The recent conference did not content itself with the addition of the word "desirable"; it examined in detail each article bearing upon the International Commission of Inquiry and revised and enlarged it, not merely in the light of theory, but in the light of experience and practice. The Commission of Inquiry of 1904 devised its procedure; the conference, under the guidance of those who had participated in the commission, reduced those temporary rules and regulations to the

precision of a code. The original institution proved of service on an historic occasion. It is to be hoped that the revisions and the procedure of 1907 will increase the efficiency of the commission and accelerate its findings of fact.

Passing now to the question of the Permanent Court of Arbitration. It will be remembered that the powers recognized questions of a juridical order as susceptible of arbitration, but the recognition is not followed by a duty to arbitrate questions of this nature. The revision expressed the desirability of the arbitration of such questions in the following apt clause: "Consequently it is desirable that the contracting parties should, as far as circumstances permit, have recourse to arbitration in any controversies which may arise on the above-mentioned question." The obligation, if any, is moral, but the recognition of desirability is an advance.

The provisions of 1899 regulating the choice of arbiters have already been given. They are defective in two ways: first, because they do not sufficiently safeguard impartiality in the choice of arbiters; and, in the second place, there is no way of selecting the umpire if the powers designated to make the choice fail to agree. The revision of 1907 seeks to obviate these objections by providing, first, that "each party appoints two arbitrators, of whom only one shall be a citizen or subject, or chosen from among those who have been designated by it as members of the Permanent Court. These arbitrators together choose an umpire." The meaning of this is, that at least one of the two arbitrators chosen by the state in litigation shall be a stranger to the controversy, and therefore free from national prejudice and bias. This provision, however defective it may be, makes for impartiality. In the next place, should the arbitrators be unable to choose an umpire, or if the powers selected fail to agree upon a choice, the revised convention provides that the powers intrusted

> shall each present two candidates taken from the list of the members of the Permanent Court outside of the members designated by the parties, and not being the citizens or subjects of either of them. It shall be determined by lot which of the candidates thus presented shall be the umpire.

This provision not merely provides an umpire so as to constitute the court, but it provides that the umpire shall be chosen from among the members of the court, and shall not be a citizen or subject of either litigant. Of the five members thus selected, two must be — three may be

— indifferent to the controversy, and the presence of each disinterested arbitrator is an additional guarantee of impartiality. Taking these provisions together, they assure the constitution of the court within a reasonable time, and an approach is clearly made to impartiality.

Article 62 of the revised convention is a further step in the direction of impartiality, for it provides : " The members of the Permanent Court shall not act as agents, counsel, or attorneys, except for the power which has appointed them members of the court."

The procedure prescribed for the tribunal of arbitration was revised in the light of experience, and, indeed, by the very members of the court who had tried the cases presented to the tribunal. The only distinct addition to the machinery providing for the peaceful solution of international difficulties consists of the provisions concerning summary procedure. The cases submitted for summary decision are expected to be of limited interest and importance. The constitution of the court is simplified by providing for a court of three instead of five, and prescribing that the proceedings before the tribunal so constituted shall be in writing. Each party to the controversy, however, possesses the right to require the appearance of witnesses and experts before the tribunal.

From this brief indication, rather than summary, of changes made, it is evident that the convention of 1907 did not innovate ; it is, however, equally evident that it continued, amplified, and perfected the convention of 1899.

The next convention concerns the limitation of the use of force for the recovery of contract debts, and its importance is such that the exact text should be set forth in full :

In order to avoid between nations armed conflicts of a purely pecuniary origin arising from contractual debts claimed of the government of one country by the government of another country to be due to its nationals, the signatory powers agree not to have recourse to armed force for the collection of such contractual debts.

However, this stipulation shall not be applicable when the debtor state refuses or leaves unanswered an offer to arbitrate, or, in case of acceptance, makes it impossible to formulate the terms of submission, or, after arbitration, fails to comply with the award rendered.

It is further agreed that arbitration here contemplated shall be in conformity, as to procedure, with Title IV, Chapter III, of the Convention for the Pacific Settlement of International Disputes, adopted at The Hague, and that it shall

determine, in so far as there shall be no agreement between the parties, the justice and the amount of the debt, the time and mode of payment thereof.

In simplest terms this convention means that the contracting parties accept the principle of arbitration as obligatory in cases of contract indebtedness; that they bind themselves in the concrete case to submit to arbitration and renounce the right to resort to force. A debtor state, acting in good faith, has no need to fear a blockade of its ports, with eventual occupation of its territory. It must agree, however, to arbitrate; it must actually arbitrate, and it must conform to the arbitral sentence in order to obtain the benefit of the renunciation of force.

The second article provides that the tribunal shall be organized, and that the procedure followed shall be in accordance with the specific regulations touching these matters in the revised convention for the pacific solution of international conflicts. And in this connection attention should be called to a provision of the revised convention likely to be of genuine service. The statement of the controversy, or compromis, as it is technically called, is often difficult to formulate. If creditor and debtor not only wish but agree to arbitrate, they may be unable to agree to the statement of the controversy to be submitted. In this case Article 53 of the Convention for the Pacific Solution of International Difficulties provides that the compromis may be established by a commission composed of five members selected from the Permanent Court, and that the commission so formed is competent to frame the issue, if requested to do so by one of the litigants, unless the parties have agreed to establish the compromis in another manner. As the commission must be selected by the joint act of the parties in controversy, it follows that neither creditor nor debtor has this method forced upon it. The presence, however, of such a provision, exerts a moral pressure to conclude the compromis or to permit its formulation by an impartial commission. This disposition will therefore be helpful; it cannot harm either party acting in good faith. The court shall examine the justice of the claim; shall establish the amount of the debt and the time and mode of payment, which findings shall be entered in the arbitral judgment and bind creditor and debtor alike. A judgment obtained by a powerful creditor need not be executed immediately, for the court by its judgment determines both the time and the mode of payment. As justice, that is to say, equity rather than

law, is the basis of arbitration, it is to be hoped, indeed expected, that the justice administered will be tempered with mercy. In any case, good faith in submitting a controversy to arbitration, good faith in accepting and executing an arbitral award, will not only preserve the self-respect of the stronger, but will guard and protect the rights of the weaker. It should not be overlooked that this simple convention is of fundamental political importance, for it is the first international recognition of the Monroe Doctrine as applied to a concrete case.

The third convention provides for the establishment of an international court of prize. It may be said, perhaps, that inasmuch as this convention presupposes war, — for capture is only permissible in time of war, — the creation of the court cannot be considered as a triumph for the cause of peace. But an institution which settles controversies between nations by peaceful methods removes the danger of a resort to arms, and therefore is an instrument to peace. It is none the less so because the controversy arose out of a war; for the purpose of a prize court is, by settling this very controversy, to prevent nations from resorting to armed settlement.

In times past the court of the captor has determined the lawfulness of prize, with every presumption in favor of the validity of the capture. The instances must indeed be rare in which the judge is not affected by national prejudice and bias. The institution of an international court, composed of fifteen judges, in which the belligerents are represented, but in which the decision of the court is reached by a majority composed of neutrals, can only mean the substitution of an international point of view for the interested and therefore contracted national conception.

The belligerent is not condemned unheard, for he is represented upon the bench as well as by counsel before the court. The excesses of belligerents and the violation of neutral rights are subject to condemnation, not by the belligerent, inflamed by passion, but by the neutrals, who have taken the protection of neutral rights into their own hands.

The court of prize is a court of appeal. The national court tries the case, as heretofore, and an appeal lies from the court of first instance to a higher national court. Should the decision of this latter tribunal be unsatisfactory, or if the national court has not decided the case within two years after the capture, the litigating nation, or,

with its permission, its subject or citizen, may request the transfer of the case to the international court of prize, which thereupon becomes seized of the law and the facts of the case. As President Roosevelt said in his recent message to Congress:

> Any one who recalls the injustices under which this country suffered as a neutral power during the early part of the last century cannot fail to see in this provision for an international prize court the great advance which the world is making towards the substitution of the rule of reason and justice in place of simple force. Not only will the international prize court be the means of protecting the interests of neutrals, but it is in itself a step towards the creation of the more general court for the hearing of international controversies, to which reference has just been made. The organization and action of such a prize court cannot fail to accustom the different countries to the submission of international questions to the decision of an international tribunal, and we may confidently expect the results of such submission to bring about a general agreement upon the enlargement of the practice.

The lovers of peace and international progress hoped that the conference would agree upon a general treaty of arbitration, for it seemed not only reasonable but feasible that all might do that which many had done separately. The general treaty thus concluded would have made the duty to arbitrate international instead of leaving it a national bilateral obligation. The public was the more confident because Article 16 of the convention of 1899 declared the arbitration of juridical questions to be the most efficacious method of settlement. This expectation, however, was doomed to disappointment, caused, it would seem, by the unwillingness of Germany to bind itself to arbitrate all questions of a judicial nature with all the nations represented at the conference. Germany accepted, however, the principle of obligatory arbitration, and expressed its willingness to conclude special conventions with powers of its own choice, as it had already done in several instances. It was for Germany to decide this question for itself, and it decided against obligatory arbitration. In so doing Germany should not be made the subject of criticism.

Germany refused, however, to permit those powers that wished, to conclude a general treaty of arbitration, insisting that every act of the conference should be unanimous, or substantially so, and that nothing should enter the Final Act against the opposition of a single state, even although this single state was not to be bound by the convention concluded. A few powers shared this view, and we have thus the

spectacle of a minority blocking the outspoken and energetic desire of the majority of the nations of the world. It would seem that if the majority cannot coerce the minority, the minority should not possess the power to coerce the majority. Feeling ran high and threats were made of withdrawal, to prevent which the majority capitulated; for a treaty of arbitration concluded under circumstances of irritation, and indirectly jeopardizing the calling of future conferences, would have been but a sorry victory. The majority, however, was unwilling to let the question drop, lest it lose the benefit of its votes in favor of obligatory arbitration; therefore the following declaration was drawn up and unanimously agreed to:

The conference, conforming to the spirit of good understanding and reciprocal concessions, which is the very spirit of its deliberations, has drawn up the following declaration, which, while reserving to each one of the powers represented the benefit of its votes, permits them all to affirm the principles which they consider to have been unanimously accepted:

It is unanimous (1) in accepting the principle of obligatory arbitration; (2) in declaring that certain differences, and notably those relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any restriction.

The declaration registers an advance; not the advance hoped for, but nevertheless a distinct gain. In 1899 arbitration of questions of a juridical nature was recognized as the most efficacious and the most equitable method of settling international disputes unsolved by diplomatic means. The declaration of 1907 establishes the principle of obligatory arbitration, and all powers subscribed to this declaration. The ordinary treaty of arbitration exempts questions affecting the independence, the vital interests, and the honor of the contracting countries. The declaration of 1907 solemnly affirms that "certain differences, and notably those relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any restriction." The declaration is thus a recognition not merely of the desirability but of the feasibility of arbitration. It is not an obligation to submit any or all international controversies to arbitration. The mere existence, however, of the declaration will exert a moral pressure, and it can be asserted confidently, and without fear of contradiction, that no power in the future will accept a brief against obligatory arbitration. The

present has cleared the way for the future, and we can well await it without fear and with a manly heart.

It may not be generally known — indeed, it does not seem to be suspected — that the conference laid the foundations broad and deep for a permanent court of arbitral justice, composed of judges appointed for a definite period, namely twelve years, and acting under a sense of judicial responsibility. The language of the Final Act is clear and definite:

> The conference recommends to the signatory powers the adoption of the project hereunto annexed of a convention for the establishment of a court of arbitral justice, and its putting into effect as soon as an agreement shall be reached upon the choice of the judges and the constitution of the court.

An analysis of this simple but important paragraph shows that the recommendation is not to consider the advisability of the establishment of a court of arbitral justice, but the adoption of the project annexed for the organization of the court. In the next place, the project of convention is to be put into effect, and the court definitely constituted, as soon as the powers have agreed upon the method of selecting the judges thus constituting the court. The conference therefore recommends for adoption a carefully considered project, annexed and made a part of the recommendation, to serve as a basis of the proposed court, and this project, when the judges are appointed, is to be the organic act of the court.

Passing to the project, we find that it consists of thirty-five articles dealing with the organization, the jurisdiction, and the procedure of the court of arbitral justice. The purpose of the framers, as well as the nature of the court, appears clearly and concisely from the first paragraph:

> In order to advance the cause of arbitration, the contracting powers agree to organize, without interfering with the Permanent Court of Arbitration, a court of arbitral justice, free and easy of access, composed of judges representing the different judicial systems of the world, and capable of assuring the continuity of arbitral jurisprudence.

Article 2 provides that the court of arbitral justice shall be composed of judges and of deputy judges chosen from among persons enjoying the highest moral consideration, and who meet the requirements

in their respective countries for admission to high magistracy, or who are jurists of known competence in international law.

Article 3 states that the judges and deputy judges are appointed for a period of twelve years, and that their mandate may be renewed.

Article 17 provides that the court of arbitral justice is competent to decide all cases brought before it in virtue of a general stipulation of arbitration or in virtue of a special agreement.

Passing from the nature of the court, its composition and jurisdiction, Article 14 provides that the court shall meet once a year. It was supposed that the court would consist of approximately fifteen judges, and that it might be as expensive as it would be undignified for it to meet and adjourn without business. It was felt, however, that cases might be ripe for presentation, and that the court should be, as the first article says, free and easy of access. It is therefore provided in Article 6 that the court shall designate annually three judges, who shall form a special delegation (judicial committee), and three others destined to replace them in case the three first delegated cannot attend. The court is to meet at The Hague; likewise the delegation; but the latter is permitted to meet elsewhere if particular circumstances require it, for the delegation is competent to sit as a commission of inquiry, as a commission of arbitration, or, finally, as a court in a summary proceeding. Should there be no business before the court, the delegation may dispense with a meeting, and in case of necessity it may convoke the court in extraordinary session.

Without entering into further details, it is seen that this court is to be a court in the judicial sense of the word, with at least one annual session; that the delegation or judicial committee is permanently in session for the trial of small cases that may be submitted to it; that, if the case be of importance, or if there be other sufficient reason, the delegation may convoke the court in extraordinary session; and an express provision requires the full court to be convoked upon the desire of any litigant nation which has a case before the court ripe for decision. The judges are permanent judges acting under a sense of judicial responsibility, chosen in such a way as to represent the various judicial systems and the languages of the world. Having a secure tenure, they are not subject to removal or recall; and deriving their salary (6000 florins per annum, with traveling expenses, and 100 florins a day during duty at The Hague) from the nations

represented in the court, and being forbidden by Article 10 to receive any salary or sum from their own appointing governments, the judges are as free from the fear of dismissal as they are deprived of the hope of financial reward.

The project does not specify the number of states necessary to agree upon the appointment of judges, nor does it prescribe the number of judges to be appointed. It is therefore open to the nations desiring the establishment of such a court to agree among themselves to establish the court, which, when established, will be binding upon the parties so constituting it and will have all the prestige of The Hague. As the reporter said in submitting the project to the conference: "We have desired not merely to build the beautiful façade of the palace of international justice; we have constructed, and even furnished, the edifice, so that the judges only need enter and be seated." Lest this may seem exaggeration, I beg to quote the measured language of the President in his message to Congress:

> Substantial progress was also made towards the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court, and a general agreement was finally reached in favor of its creation. The conference recommended to the signatory powers the adoption of a draft, upon which it agreed, for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.

We are now prepared to answer the question whether the Second International Peace Conference was in reality a peace conference, and whether it deserves a successor. It was international because the nations of the world were represented. The First Conference invited but a fraction of the independent sovereignties; the present conference invited forty-six nations, and forty-four attended. It was a peace conference because its great measures sought, by preventing a recourse to arms, not only to preserve but to establish peace.

First. It revised the Convention for the Pacific Solution of International Conflicts, so as to make it more comprehensive and more adequate to meet the purpose for which it was created.

Second. It agreed unanimously to renounce force and to submit to arbitration international difficulties arising out of contract indebtedness.

Third. It established an international court of prize, in order that the captor's acts should no longer be judged under the bias of national prejudice, but should be approved or disapproved, and the rights of neutrals safeguarded, by an international court in which the belligerent as well as the neutral interests are represented.

Fourth. It unanimously recognized the principle of obligatory arbitration, and stated with unanimity that certain great questions of a juridical nature, especially the interpretation and application of international conventions, are susceptible to obligatory arbitration without restriction.

Fifth. It laid the foundations, indeed established, a court of arbitral justice, leaving, however, the appointment of the judges to the subsequent agreement of interested nations.

Sixth. It provided that a Third International Conference of Peace meet approximately eight years hence, under charge of the powers, and that the conference organize and conduct its proceedings under a sense of international responsibility and under the domination of no one nation.

I submit, therefore, that the Second International Peace Conference justified not only its name but its calling; that it was worthy of its great predecessor; that its meeting has bettered the world and given mankind a hope for the future, and that it therefore deserves a successor.

AMERICAN ADDRESSES

AT THE SECOND HAGUE CONFERENCE

I. MR. CHOATE'S ADDRESS ON THE IMMUNITY FROM CAPTURE OF PRIVATE UNOFFENDING PROPERTY OF THE ENEMY UPON THE HIGH SEAS JUNE 28, 1907[1]

[The immunity of private, unoffending property of the enemy upon the high seas has always been a favorite doctrine, although it has never been the practice of the United States; and in season and out of season, whether included in the programme or not, the United States has sought to secure international acceptance of the proposed immunity. The subject did not figure in the programme of the First Conference, and yet, as explained by Mr. Choate, the American delegation presented a memorial in its behalf. The conference recommended that it be "referred to a subsequent conference for consideration." Accordingly it was included in the programme of the Second Conference, and was there discussed with great care, learning, and feeling. The project proved unacceptable to the larger maritime nations, such as Great Britain, France, Russia, and Japan, although Germany, Austro-Hungary, and Italy expressed themselves in its favor. As the learned reporter, M. Henri Fromageot, has well said, "All the arguments in favor of immunity were sustained with an eloquence and a dialectical force difficult to surpass." Various projects and counterprojects were submitted, but each in turn failed of adoption. In concluding his admirable official report, M. Fromageot says:

> The proposition of the United States of America (immunity), put first to vote, received from the forty-four states represented 21 yeas, 11 nays, 1 abstention, eleven states not responding to the roll call.
>
> In the absence of a number of votes sufficient to insure a unanimous agreement, or at least an accord well-nigh general, the commission passed to the Brazilian proposition (*assimilation of naval to land warfare*). The vote to take it into consideration having resulted in a fairly equal division of the votes cast, and in numerous absentions, the delegation of Brazil withdrew its proposition.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (4th Commission, June 28, 1907), Vol. II, pp. 750–764, 766–779.

The Belgian proposition (*substitution of sequestration for confiscation*), after having received a majority in favor of its consideration, was unable, in the discussion of its articles, to obtain what could be deemed a sufficient vote in its favor, and the royal delegation asked that it be withdrawn from consideration.

Before the diversity of opinion thus expressed and the hope of concentrating the votes on a single formula, the president of the commission proposed to make the recommendation that in future, at the beginning of hostilities, the powers declare of their own accord if, and in what conditions, they have decided to renounce the right of capture.

But, here again, objections were raised from various quarters and the compromise *vœu* was withdrawn.

The commission was thus obliged to express its opinion, in the final result, upon the twofold *vœu* proposed by the French delegation (*suppression of individual shares of prize money, participation of the state in the losses suffered by capture*). This *vœu*, notwithstanding an amendment of Austria-Hungary, likewise resulted only in an indecisive vote and in numerous abstentions.

Such is the summary of this long discussion of one of the most important questions of the programme of the commission. I have endeavored to make it true, without, however, imposing upon your time. I wish I could have better expressed the profound impression left in each one of us by the beautiful addresses which it was our privilege to hear. If the maintenance of the present state of affairs seemed to result necessarily from this discussion, it is permitted to hope, with the eminent First Delegate of Belgium, his Excellency M. Beernaert, that a future agreement is not impossible.[1]

In support of the proposition presented by the American delegation, Mr. Choate delivered the following address.]

The government of the United States of America has instructed its delegates to the present conference to urge upon the nations assembled the adoption of the following proposition:

The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers.

This proposition involves a principle which has been advocated from the beginning by the government of the United States, and urged by it upon other nations, and which is most warmly cherished by the American people; and the President is of opinion that whatever may be the apparent specific interest of our own or of any other country for the time being, the principle thus declared is of such permanent and universal importance that no balancing of the chances

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 248–249.

of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the consideration of common benefit to civilization which calls for the adoption of such an agreement.

At this rare moment of universal peace existing throughout the world, the representatives of all the nations of the world are assembled for the first time to consult and agree upon what may tend to make this peace permanent; and while each nation is, of course, at liberty to contend here for what its own peculiar interests demand, there should be a spirit of mutual concession and compromise, which would favor the adoption of a principle so clearly for the common benefit of mankind, although it may demand of particular nations the yielding of some relic of ancient belligerent rights.

We are here under circumstances which demand of the conference the fullest and fairest consideration of this important question. In the First Peace Conference in 1899 the subject was not included in the programme, and being embodied in a memorial of the United States Commission addressed to his Excellency M. de Staal, president of that conference, strongly urging its consideration, the memorial was referred by him to the appropriate committee, which reported that the committee did not consider itself competent to discuss the subject, and that it was therefore not ready to consider the question upon its intrinsic merits, but that it had instructed its chairman to report in favor of a resolution to be adopted by the conference, expressing the hope that the whole subject would be included in the programme of a future conference. And after the representatives of two of the great powers had announced that, in the absence of instructions from their government, they were obliged to abstain from voting, the report of the committee was unanimously adopted; and accordingly, in the Final Convention adopted on the 29th of July for the specific regulation of international conflicts, it was unanimously voted, saving the abstentions referred to, as follows:

> The conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration.

We are here, therefore, to-day, with our favorite proposition, as a matter of right, the same having been included in the original

programme for this conference proposed by his Imperial Majesty the Emperor of Russia, and assented to by all the powers, so that no nation can properly refuse to vote upon it on the plea of want of instructions.

We have said that the immunity of the private property of belligerents at sea has been the traditional policy of the United States from the formation of its government, and, as will appear, it was so even before that date.

But at the outset, to avoid any misapprehension that might arise from this statement, I ought most frankly to concede that the United States has never been able to put this policy into practical operation, because other powers, although sometimes resorting to it for temporary purposes or by special agreement, have never consented to make such immunity a permanent rule of international law. And as this could not be accomplished except by the general consent of all the nations, it has in practice in all its wars, following the usages of other nations, made use of the belligerent rights of capture of enemy's private ships, and sometimes, as in the War of 1812, to a very large extent; and only very recently has it by statute abolished prize money, which has generally been regarded as a material incentive to such capture. We thus confess that our government has heretofore acted without regard to the growing sentiment of our own citizens and of those of other nations in favor of immunity, and in this respect we claim to be no better than any other of our sister nations when acting as belligerents. It never would be possible or practicable for any belligerent to adopt the rule unless it becomes, as we hope it eventually will become, a positive rule acknowledged by every maritime power.

But now, in the light of our own experience of the comparative benefits and mischiefs that have resulted in the past from the exercise of this belligerent right, and of its constantly decreasing value to belligerents by reason of increased facilities of transportation by land from neutral ports and through neutral territories to belligerents, and because the great powers are to-day concentrating their fleets for purely military operations looking to the control of the sea, and are only building vessels which are useful for combat, we think the time has come to appeal to the maritime nations of the world assembled in this conference to agree to desist from this antiquated and

mischievous resort to the capture of enemy's ships, and to leave the high seas free for the prosecution of innocent and unoffending commerce, the security and integrity of which is of such vast consequence to all the world.

In his message to Congress, in December, 1903, President Roosevelt, quoting and enforcing a previous message of President McKinley in December, 1898, said:

> The United States has for many years advocated this humane and beneficent principle, and is now in a position to recommend it to other powers without the imputation of selfish motives.

In response to this message the Congress of the United States, on the 28th of April, 1904, adopted the following resolution:

> That it is the sense of the Congress that it is desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

In the negotiation bearing upon the treaty of peace with Great Britain in 1783, four years before the adoption of the Constitution of the United States, that great lover of peace, Benjamin Franklin, our accredited plenipotentiary in Europe, strongly urged the adoption of this principle and proposed the insertion in the treaty of this clause:

> And all merchants or traders with their unarmed vessels, employed in commerce, exchanging the products of different nations and thereby rendering the necessary conveniences and comforts of human life more easy to obtain and more general, shall be allowed to pass freely unmolested. And neither of the powers, parties to this treaty, shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships or interrupt such commerce.

Our Secretary of State, Henry Clay, in his instructions to the delegates representing the United States at the Panama Conference in 1826, directed them to bring forward at the contemplated congress the proposition to abolish war against private property and noncombatants upon the ocean, declaring that this had been an object which the United States had much at heart since they assumed their place among the nations.

And Secretary of State John Quincy Adams, in his instructions to our minister to England in July, 1823, had said:

> It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure or confiscation as such, and private war itself has been almost universally exploded upon the land. By an exception, the reason of which it is not easy to perceive, the private property of an enemy upon the seas has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continues to disgrace and afflict them by a system of licensed robbery bearing all the most atrocious characteristics of piracy.

President Monroe, in his annual message to Congress in 1823, stated:

> Instructions have accordingly been given to our ministers with France, Russia, and Great Britain, to make proposals to their respective governments to adopt the principle as a permanent and invariable rule in all future maritime wars. And when the friends of humanity reflect on the essential amelioration of the condition of the human race, which would result from the abolition of private war on the sea, and on the great facility by which it might be accomplished, requiring only the consent of a few sovereigns, an earnest hope is indulged that these overtures will meet with an attention animated by the spirit in which they were made, and that they will ultimately be successful.

Not only by such declarations, embodied in official instructions, has the United States asserted this principle, but in its diplomatic dealings with other nations it has carried it into actual effect as far as possible. In its treaty with Frederick, king of Prussia, negotiated in 1785, two years before the adoption of the federal Constitution, negotiated by Benjamin Franklin, Thomas Jefferson, and John Adams, it was embodied in the treaty in almost the identical language in which it had been proposed by Franklin to Great Britain two years before.

A similar provision was inserted in the treaty between the United States and the king of Italy in 1871. When our government was invited to give in its adhesion to the declaration of the Congress of Paris in 1856, in which it was not represented, whereby it was provided that privateering is and remains abolished, that the neutral flag covers enemies' goods, with the exception of contraband of war, and that neutral goods, with the same exception, are not liable to capture under an enemy's flag, it declined to do so unless the

declaration should be extended to include the exemption of enemies' ships as well as their goods in neutral vessels. But then and ever since it has declared its willingness to give up the right of privateering, if the other maritime nations would agree to recognize its declared principle of the immunity of the private property of noncombatants at sea.

It is pertinent to call the attention of the conference to the extent to which our principle has been carried into active effect by other nations from time to time and for temporary periods.

The principle was adopted and carried out in the War of 1866 by Prussia, Italy, and Austria, the three powers concerned; and in 1854, when the Crimean War broke out, it was announced that operations would be confined to organized military and naval forces of the enemy. But the announcement was accompanied with the distinct reservation that the rights enumerated were waived for the time being only. And on the outbreak of the Franco-Prussian War of 1870 an attempt was made by one of the belligerents to protect noncombatant commerce, but the protection was eventually withdrawn on the claim that it was not properly reciprocated by the other belligerent.

In 1865 Italy adopted a maritime code forbidding the capture of mercantile vessels of all hostile nations, provided reciprocity in that respect was observed by the other belligerent, and the rule was observed in the war between Italy and Austria shortly afterward.

There have also been frequent declarations upholding our principle by bodies whose utterances were entitled to very great respect.

In 1859 an assembly of influential merchants and shippers held at Bremen declared in favor of the doctrine, and Hamburg, Stettin, Breslau, and the Chambers of Commerce of upper Bavaria concurred in this expression of enlightened policy.

On the 18th of April, 1868, the Reichstag of the North German Confederation adopted almost unanimously a resolution proposed, which directed the chancellor of the federation to undertake negotiations with other powers, in order to secure the recognition of the principle of immunity. And the declaration of Delbrück in the Bundesrath left no room to doubt that the Bundesrath, and especially the Prussian government, regarded the reaching of this goal as desirable as corresponding to the traditions of Prussian policy.

Professor von Bar, to whom we are indebted for the last facts above recited, says further:

Even in England pronouncements of a like kind had been several times made. And in the Brussels International Conference of 1874, which busied itself with the laws of war, the Russian government introduced a projet in which it was expressly said that operations of war should not direct themselves against private persons, a principle incorporated in Article 40 in the projet of the Brussels conference in the following words: "Private property ought to be respected." In 1875 the Institution of International Law declared expressly for the immunity of enemy private property (enemy merchant ships), reserving, however, the right of capture of contraband.

It may be stated without qualification that the Chambers of Commerce throughout the world have declared in favor of our principle and urged its adoption by their various governments.

It may not be improper to observe that the government of the United States has uniformly advocated the doctrine of immunity under all the vicissitudes through which it has passed, without regard to its effect upon its temporary interests for the time being. Before we had an organized government, with no army and no navy, and only a feeble merchant marine, afterwards as that marine gradually but surely increased in amount and value, until at last it became a close second to the mercantile marine of England,—at a later period, in our Civil War, when by the incursions of a few Confederate cruisers our merchant shipping engaged in foreign commerce was actually swept from the seas, so that at the end of the Civil War, when our extemporized navy was dispersed, we had neither naval nor commercial marine,—and so on, down to the present time, when we have an efficient navy, but only a meager tonnage engaged in foreign commerce, only about seven per cent of our great exports and imports passing in and out of the port of New York under our own flag;—in all these varying circumstances, without regard to its direct or indirect effect upon our own fortunes and interests, we have uniformly advocated the doctrine as one of immense importance to civilization and to the general welfare of all nations.

In this we may fairly claim that we have been sustained by the general consensus of statesmen and jurists of many countries, who have made themselves felt upon the question. Beginning with England, we have the utterance of Lord Brougham in 1806:

The private property of pacific and industrious individuals seems to be protected, and except in the single case of maritime capture it is spared accordingly by the general usage of all modern nations. No army now plunders unarmed

individuals ashore, except for the purpose of providing for its own subsistence. And the laws of war are thought to be violated by the seizure of private property for the sake of gain, even within the limits of the hostile territory. It is not easy at first sight to discover why this humane and enlightened policy should still be excluded from the scenes of maritime hostility, or why the plunder of industrious merchants, which is thought disgraceful on land, should still be accounted honorable at sea.

And Lord Palmerston, in his address to the Liverpool Chamber of Commerce on November 8, 1856, declared:

I cannot help hoping . . . that in the course of time those principles of war which are applied to hostilities by land may be extended without exception to hostilities by sea, so that private property shall no longer be the object of agression on either side. If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals. It is the conflict of armies by land and of fleets by sea that decides the great contests of nations.

And Mr. Cobden, in 1862, in his address to the Manchester Chamber of Commerce, after referring to the refusal of the government of the United States to adhere to that part of the Declaration of Paris abolishing privateering, said:

That government . . . stated that they preferred to carry out the resolution which exempted private property from capture by privateers at sea a little farther, and to declare that such property should be exempted from seizure whether by privateers or by armed government ships. Now, if this counter proposal had never been made, I contend that after the change had been introduced affirming the rights and privileges of neutrals it would have been the interest of England to follow out the principle to the extent proposed by America.

And John Stuart Mill, in a speech in 1867, said:

Those who approve of the Declaration of Paris mostly think that we ought to go still farther; that private property at sea, except contraband of war, should be exempt from seizure in all cases, not only in the ships of neutrals but in those of the belligerent nations. This doctrine was maintained with ability and earnestness in this house during the last session of Parliament, and it will probably be brought forward again, for there is great force in the argument on which it rests.

Sir Henry Maine, a great authority on international law, as well as upon the principles of justice in general, writing in 1888 with a view to satisfy his government that it was greatly for the interest of Great Britain to concur in the American doctrine, said:

These, of course, are economical reasons, but I also look on the subject from the point of view of international law. Unless wars must be altogether discarded, as certain never again to occur, our situation is one of unexampled danger. Some part of the supplies which are matter of life and death to us may be brought to us as neutral cargo with less difficulty than before the Declaration of Paris was issued, but a nation still permitted to employ privateers can interrupt and endanger our supplies at a great number of points, and so can any nation with a maritime force of which any material portion can be detached for predatory cruising. It seems, then, that the proposal of the American government to give up privateers on condition of exempting all private property from capture might well be made by some very strong friend of Great Britain. If universally adopted, it would save our food, and it would save the commodities which are the price of our food, from their most formidable enemies, and would disarm the most formidable class of these enemies.

And finally, as expressive of the sentiments of at least a portion of the English government and people of the present day, we have the letter to the *Times* of October 14, 1905, of the present lord chancellor of Great Britain, in which he most emphatically indorses the American doctrine. He says:

It may be asked, what prospect is there of altering the law in this respect, even if we desired it. An answer may be found in the history of this question, upon which, instructive though it be, a few words must suffice. During the last fifty years or more the United States have persistently advocated this change, even to the point of refusing to abandon the right of privateering in 1856 unless all property, other than contraband, should be declared free from maritime capture. Germany, Austria, Italy, Russia, have all, within the last half century, either adopted in their own practice or offered to adopt the American view, and continental jurists have almost without exception denounced the existing law. Last year President Roosevelt declared in favor of a new international conference at The Hague, and notified that among other matters for deliberation the United States intended again to press this very subject on the attention of the powers. Unquestionably the American President, with the immense authority he now wields, will exert every effort to maintain his point. I trust that his Majesty's government will avail themselves of this unique opportunity. I urge it not upon any ground of sentiment or of humanity (indeed, no operation of war inflicts less suffering than the capture of unarmed vessels at sea), but upon the ground that on the balance of argument coolly weighed the interests of Great Britain will gain much from a change long and earnestly desired by a great majority of other powers.

It may also be safely asserted that the judgment of many eminent English writers on international law has been pronounced in support of the American doctrine.

Nor have continental authorities been backward in support of the same policy. Chateaubriand declared on behalf of the French king that could all nations be induced to agree to the principle, "his Majesty would congratulate himself on having given a salutary example, and in having proved that without compromising the success of war its scourge could be abated."

Count Nesselrode, who for many years controlled the foreign affairs of Russia, expressed himself to Mr. Middleton, the American minister at St. Petersburg, who negotiated the treaty of 1824 between the two countries:

> That the emperor sympathized with the opinions and wishes of the United States, and as soon as the powers whose consent was indispensable to make it effective was obtained, he would authorize his minister to discuss the different articles of an act which would be a crown of glory to modern diplomacy.

And many eminent continental writers on international law, whose authority is not limited to the boundaries of their own country, such as Bluntschli, Calvo, Rolin-Jaequemyns, Pierantoni, Ahrens, Perels, Dupuis, and de Martens, might be cited in strong support of the same view.

By authority of President Roosevelt, we ask for the adoption by the conference of this historic American doctrine on broad humanitarian grounds, as tending greatly to promote the cause of civilization, as removing the last relic of barbarism in maritime warfare, and as a great principle of justice which is sure to advance the cause of peace, as indispensable in the general interests of neutrals, and for the preservation of the integrity of commerce in which the community of interest of all nations is at last finally established.

There is no reason for the immunity of private property upon land from wanton plunder and destruction, which does not equally apply to similar property upon the sea. We do not ignore or in any way seek to evade the rules of military law by which private property upon land may be occupied and held for legitimate military purposes, such as making requisition for the support of armies, or for levying taxes, or with a view to ultimate annexation by the victor, of which the unrestricted right of commercial blockade is a fair equivalent on the sea.

But leaving aside all that part of military law which is undisputed, because it has no bearing upon the present question, we submit that

there is a perfect analogy between the exemption of private property on land not needed for military purposes from spoliation and destruction, which is now established for centuries by the usage of nations, and a similar exemption which we claim for private property on the sea, not needed for military purposes.

We do not deny that a private house and its contents, which stood in the way of a hostile advancing army, in its efforts to reach and attack the other belligerent, might properly be swept away and be entitled to no exemption. But nothing can be better settled than that, apart from the military necessities already referred to, for the commander of an army to send out forces for the purpose of robbing private houses of their contents and destroying the residences of unoffending noncombatants would be a gross violation of every principle of justice and good morals and of the existing laws of war; and to this extent, in the same way, the wanton spoliation of noncombatant ships and cargoes not needed for military purposes, for the mere purpose of enriching the captors or their government, or of terrorizing the unfortunate owners and their government and coercing them to submit to the will of the triumphant belligerent and to accept his terms, is abhorrent to every principle of justice and of right, and ought to be remitted to the same category of condemnation in which similar outrages upon noncombatants on land are now universally included.

It may not be out of place at this point to define the limits of the concession which our proposition demands of belligerent nations, or of those who are liable at any time to become so. In demanding the exemption of enemy ships, with whatever cargo they may contain, from capture and destruction, we are but following in the footsteps of Great Britain and the other parties to the Treaty of Paris of 1856, and carrying to its logical conclusion the great step in advance towards the amelioration of the horrors of war that was then made by them. By her Order in Council of April 15, 1854, Great Britain declared that her Majesty, being desirous of rendering the war (that is, the Crimean War) as little onerous as possible to the powers with whom she remained at peace, and in order to preserve the commerce of neutrals from all unnecessary obstruction, was willing to waive a part of the belligerent rights appertaining to her by the law of nations, and "that her Majesty would waive the right of seizing enemy's property

laden on board a neutral vessel unless it be contraband of war," which was a wide and magnanimous departure from the doctrine which up to that time she had tenaciously held of the right of seizing enemy's goods wherever found.

The credit of this first step in this progress to peace belongs exclusively to Great Britain, and should be universally acknowledged, as it is a complete answer to any suggestion that she stands in the way of such progress. The declaration that followed the close of the war, signed by the representatives of France, Austria, Prussia, Russia, Sardinia, Turkey, and England, established this first step as a full and final one on the part of those nations and of about forty other states which have since given in their adherence. And, as Mr. Sheldon Amos says, "It is well known that the continual refusal to adhere on the part of the United States is solely due to their insisting on securing still greater immunities for commerce as the price of abandoning their right to use privateers."

The reason which the United States of America gave for refusing to adhere to the Declaration of Paris was that it did not go far enough, in that while exempting from seizure merchandise, enemy's property, on neutral vessels, it did not carry that doctrine to its logical conclusion and exempt also from seizure ships belonging to individuals of the enemy.

In a letter addressed to the Count de Sartige, French minister at Washington, July 28, 1856, Mr. Marcy, Secretary of State, proposed, in the name of his government, to add to the first article of the Declaration of Paris (abolishing privateering) the following words: "And the private property of subjects or citizens of any one of the belligerent powers shall not be subject to seizure by the vessels of the other unless they contain contraband of war." After saying, "Justice and humanity demand that this practice (of subjecting private property on the ocean to seizure by belligerents) should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas."

And he justified his proposition in an elaborate argument. Our position then was, and ever since has been, that we were ready to give up privateering whenever the other powers should consent to extend the principle of immunity to enemies' ships as well as to their goods on neutral vessels.

It is significant that Russia welcomed the proposition of Mr. Marcy in terms that deserve to be recalled. In September, 1856, Prince Gortschakoff wrote to the Russian minister at Washington:

> Your Excellency will have occasion at Paris to take notice of the note of Mr. Marcy, in which the proposition of America is developed in a manner so able and so luminous that it commands conviction. The Secretary of State does not give exclusive weight to the interest of the United States. He maintains that of all the peoples. He has supported this generous idea by arguments which admit no reply. The attention of the emperor has been excited to the highest degree by these overtures of the American cabinet. In its way of putting the question they deserve to be taken into serious consideration by the powers signatory to the Treaty of Paris. They would honor themselves in proclaiming to the world in a unanimous resolution the principle that the inviolability which they have always recognized as to private property on land should be also extended to that property at sea. They would thus crown the work of pacification which has called them together, and they would give to peace a new guarantee of duration. By order of the emperor you are invited to lay these views before the minister of foreign affairs and to let him know that if the American proposition becomes the subject of deliberation in common among the powers, it will receive a decided support on the part of the representative of his Imperial Majesty. You are likewise authorized to declare that your august master would be disposed to take the initiative in that matter.

And Mr. Laveleye says in the same connection: "The proposition of the United States was well received by all the other states signatory to the Congress of Paris, above all by France and Russia. Piedmont and Holland applauded it and even England did not reject it."

Since this declaration, all that remains to the parties to it, as belligerents, of the ancient right of capturing and destroying enemy's property, is limited to enemy's ships. And the question is, whether this remnant of belligerent right under present circumstances is of sufficient value for military purposes to justify a belligerent state in refusing to waive it in response to the general demand of public opinion already everywhere pronounced in the most emphatic manner, and which is sure, sooner or later, to command on the part of all nations obedience to its behests; for nations, like individuals, however powerful in themselves, are the subjects of public opinion, which in the end must rule the world.

As to the value of this remnant of belligerent right, it is to be observed that in modern times it has greatly diminished and is still rapidly diminishing. In ancient times it was perhaps the principal factor

in maritime war,—the power to destroy enemy's property of every kind, public and private, wherever it could be found afloat. But now that war has properly come to be regarded as a test of strength between the organized armed forces, and the financial ability of the respective contestants to maintain the contest by sea and land, the power to destroy enemy's noncombatant ships upon the sea is no longer a very potent factor.

No instance, we think, can be found in modern wars of a war having been prevented or shortened by the exercise of this power, and the destruction of merchant shipping has been and is, and is likely to be, a comparatively trifling incident in the contests of nations. Take, for instance, our own Civil War, which lasted for four years, and during which, as we have said, our mercantile shipping was substantially destroyed or swept from the seas by a few Confederate cruisers. The fact distressed us very much, but it exercised not the slightest influence in bringing the war to a close, which was brought about by the maintenance of an effective blockade and the overwhelming superiority of the military and financial power of the Union.

Our experience in that contest shows that the first thing that happens on the commencement of a war to which a maritime nation is a party, is the transfer to neutral flags and bottoms of the principal part of its carrying trade, and a transfer, by means of insurance against the war risk and largely to foreign nations, of liability to loss by the destruction of that which remains under the flag. So that this remnant of belligerent power, whether regarded as a deterrent from war or as a means of terrorizing the enemy's government and reducing it to submission as a means of terminating the war, has ceased to be an important factor.

Again, this remnant of right to destroy enemy's noncombatant merchant ships is not to be confounded with the right of blockade, which, if our demand is granted, will still remain in full force. It has been argued, on the part of those who would maintain for belligerents the continuance of the ancient practice, as if we were demanding some impairment of the right of blockade. But our proposition as we have stated it excludes all possibility of this idea, as we ask only for the exemption from capture of enemy's merchant ships not carrying contraband of war and not attempting to violate a blockade.

It is, therefore, for every nation to judge for itself whether, since the Declaration of Paris which gave much more than half the right away, and since these changes in modern methods of business which have so materially minimized the value of the remnant of the right, it is of sufficient importance to justify it in refusing to abandon what remains, in deference to the general demand of the civilized world, and whether it may not safely comply with this demand and give up what is of so little value, and carry out to its logical conclusion the humane reform of the evils of war, which was so nobly commenced in 1854 and 1856.

On behalf of the United States of America we make this appeal to our sister nations to give their assent to our humane and pacific proposition which we for more than a century have sought to bring about. First, on humanitarian grounds. The capture and destruction of enemy's private property at sea, belonging to unoffending noncombatants who are pursuing international trade, not for their own benefit alone, but for the common benefit of the world, is the last remaining element of ancient piracy. To despoil innocent and unoffending merchants, who are taking no part in the war, of their ships and the goods contained in them, or to destroy them if the convenience of the captors requires, savors of the savagery of ancient war. It ought no longer to be tolerated by civilized nations. And as it is generally accompanied by holding, under most unwholesome conditions, the crews of the captured ships, this greatly adds to the cruelty and barbarity of the proceeding. As matters now stand, the damage to the individual owners far outweighs any possible benefit to the belligerent state.

Secondly, we place it on the ground, more important still, of the unjustifiable interference with innocent and legitimate commerce, which concerns not alone the nation to which the ship belongs but the whole civilized world. The growth and development of international trade and commerce during the last fifty years is one of the marvels of history. It tends more than anything else to bind the nations together in the bonds of peace, and creates a community of interest, which is immediately disturbed by any violent interference with it in any part of the globe. There is hardly an interest in any nation that is not immediately disturbed and subjected to jeopardy and loss by any such interference.

The merchant ship itself is but a fragment, and an inconsiderable fragment, of the commercial adventure in which it is engaged. The transportation of the cargo interests generally the neutral world and that interest ramifies in all directions. And the capture and destruction of the ship involves all such interests in damage and ruin. As a very distinguished English writer has said:

> The organization of international trade demands for its conditions stability and confidence, and whatever impairs these not only to that extent weakens the organization but goes a long way to destroy it.
>
> But the capture of private property at sea is simply the ruin of this organization and of all on which it depends. Were maritime wars at all more common than they are, international trade would be impossible and the most pacific nations would suffer equally with those most frequently belligerent. As it is, the miserable and trivial gains acquired by making maritime prizes, and the loss occasioned to the enemy's resources by hampering his commerce, make but a poor compensation for the utter disorder in which even the capturing state involves its own trade, and the widespread confusion and disaster which is spread on every side among neutral states.

We insist upon our proposition in the third place as a direct advance towards the limitation of war to its proper province,—a contest between the armed forces of the states by land and sea against each other and against the public property of the respective states engaged. If this rule, which we advocate, is adopted by the common concurrence of nations, that portion of destructive war which has heretofore wrought only mischief to mankind will be put an end to, and armies and fleets, instead of being employed for the protection or destruction of innocent property of noncombatants, will be left to their proper duty of fighting each other, of maintaining blockades, and protecting seacoasts. If it be said as was objected by Lord Palmerston already quoted, and who afterwards changed his mind and in 1862 declared, "that if we adopted these principles we should almost reduce war to an exchange of diplomatic notes," we reply, as Sir John Lubbock (now Lord Avebury) did in the House of Commons, "Well, that would be a result which we could contemplate not only with equanimity but with satisfaction."

"The tendency of history," he declared, "had been to render wars more humane as civilization progressed, and the extension of the Declaration of Paris to all property afloat was merely another step in that direction."

And finally we object to the old practice and insist upon our demand for its abolition on the ground that it is now no longer necessary, and that it tends to invite war and to provoke new wars as a natural result of its continuance.

At the present day, by the general consent of the civilized nations of the world, and independently of any expressed treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews unarmed, and honestly pursuing their peaceful calling, are exempt from capture as prize of war. This rule is one which prize courts, administering the law of nations, are bound to take judicial notice of and to give effect to, in the absence of any treaties or other public acts of their own government in relation to the matter.

The reason given is a purely humanitarian one, that they are engaged in feeding the hungry even though it be the hungry of the other belligerent, and that it would be too hard to snatch from poor fishermen the means of earning their bread.

This matter was well put by Louis XVI, when his forces were engaged in the American war of independence, in a letter addressed by him on June 5, 1779, to his admiral, informing him that the wish he had always had of alleviating as far as he could the hardships of wars had directed his attention to that class of his subjects which devoted itself to the trade of fishing and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen nor to arrest their vessels laden with fresh fish, even if not caught by those vessels, provided they had no offensive arms and were not proved to have made any signals creating a suspicion of intelligence with the enemy. The capture and ransom by a French cruiser of the *John and Sarah*, an English vessel coming from Holland, laden with fresh fish, were pronounced to be illegal. The whole subject was fully considered by the Supreme Court of the United States in the case of The Paquette Habana, 175 U. S. 677.

In the changed conditions of commerce and of naval warfare at the present day it is difficult to understand why the same principle of

immunity should not be extended to the unarmed vessels of the enemy which are engaged in the peaceful pursuit of "exchanging the products of different places and thereby rendering the necessaries, conveniences, and comforts of life more easy to obtain."

The temptation to any nation desiring or likely to be engaged in war to attack and prey upon the mercantile marine of its adversary as a first blow to impair his strength is very pressing and urgent, and is an inducement much more likely to lead to war than is the fear of a similar attack from the adversary a deterrent from it, especially in the case of a nation that itself has a small mercantile marine but can muster cruisers or gunboats sufficient to attack the unarmed merchant vessels of the other side upon the sea.

And history shows us many instances where the spoliation of a nation's commerce has led, out of revenge and a spirit of retaliation, to new wars. Indeed our own experience, as the result of our Civil War, is a marked illustration of this tendency. The destruction of our mercantile marine necessarily led, under the circumstances which brought it about, to the presentation on our part of what were known as the Alabama Claims, the existence of which, unsettled, produced for many years a very disturbing and imbittered state of feeling between us and Great Britain, which was finally and happily relieved by the exercise of mutual patience and forbearance in sending the whole subject for amicable adjustment to the arbitration at Geneva, which resulted in the restoration of friendship and good feeling between the two countries which have subsisted to the present day.

To quote again from the distinguished writer to whom we have already referred: "There is no doubt that the widespread irritation occasioned by the capture of private property at sea as much as on land is one of the main provocatives of enduring national hatred."

Apart from all historical and ethical points of view, it may well be claimed that there is another strong ground in support of the immunity of private property at sea not needed for military purposes, for which we contend. From economical considerations it is no longer worth the while of maritime nations to construct and maintain ships of war for the purpose of pursuing merchant ships which have nothing to do with the contest. The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such service, and to concentrate their entire

resources upon the construction of great battle ships whose encounters with those of their adversaries shall decide any contest, thus confining war, as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and indeed a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the great navies now existing could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle, and the expense would be more than any probable result.

This presents in another form the idea already referred to, that war has come to be, as it should be, a contest between the nations engaged, and not between either nation and the noncombatant citizens or individuals of the other nation; and it results from it that the noncombatant citizens should be let alone, and that no amount of pressure that can be brought to bear upon them will have any serious effect in preventing or shortening any controversy.

We believe it to be true also that the policy and the necessary policy of maritime states to-day is to concentrate their fleets, so as to be prepared to meet any emergency of war with the aggregate force of such fleets, which practically will forbid to any considerable extent the pursuit of scattered merchantmen.

It is not within our province, nor would the proprieties of the occasion permit us, to attempt to convince the representatives of any nation taking part in this conference that its own national interest requires it to give up the ancient practice and accept our proposition. There seems in several of the nations to be some division of opinion upon the subject, the merchants, the statesmen, the jurists, and the majority of the press being generally in favor of our proposition.

What we hope to do is to satisfy the conference as a body, and that by a great majority, that the general welfare of all the nations together, as having a community of interest in the commerce of the world, requires the adoption of the principle of immunity of private property at sea, with the exceptions embodied in our proposition. Of course it will require an agreement of all to bring about a passage of a resolution in the name of the conference, and thereby to put an end to

the existing practice. But we feel so strongly that our cause is just, and that the general opinion of the nations is with us, that we deem it extremely desirable that after the discussion a vote shall be taken of all the nations engaged in the conference, with the hope that although such a vote may not result in the adoption of a unanimous decision, it will so impress the nations who dissent, as to dissuade them in future conflicts from carrying the existing rule any longer into actual practice, except in the last necessity. The strict international legal right of capture may remain unimpaired, but the moral effect of a general expression of opinion against it may prevent its any longer being carried into actual operation.

It is not incumbent and may not be proper for us at this time to anticipate the objections which will be raised and presented to our proposition. But one or two which have already been often presented in public discussion may properly be referred to.

It is said that the most effective means of preventing war is to make it as terrible as possible, and that to this end the destruction of private property at sea, carrying havoc among private owners and to a certain extent enfeebling the government and nation of which they form a part, is a justifiable expedient.

We deny that it is the duty or the right of any nation to make war as horrible as possible, and that no such proposition can for a moment be tolerated by any conference of civilized states. If it be true, the whole labor that has been expended in the last fifty years towards mitigating the horrors of war, towards preventing its recurrence and bringing about its speedy termination, has been wasted and spent in vain. If it be true that our duty is to make war as horrible as possible, let us undo all that we have accomplished since the world set itself seriously at work to prevent and mitigate the horrors of war. Let us repeal the Declaration of Paris. Let us resume all the savage practices of ancient times. Let us sack cities and put their inhabitants to the sword. Let us bombard undefended towns. Let us cast to the winds the rights of security that have been accorded to neutrals. Let us make the sufferings of soldiers and sailors in and after battle as frightful as possible. Let us wipe out all that the Red Cross has accomplished at Geneva, and the whole record of the First Peace Conference at The Hague, and all the negotiations and lofty aspirations that have resulted in the summoning of the present conference.

Of course there is no truth or sanity in such a brutal suggestion. Our duty is not to make war as horrible as possible, but to make it as harmless as possible to all who are not actually engaged in it, to prevent it as far as we can, to bring it to an end as speedily as we can, to mitigate its evils as far as human ingenuity can accomplish that result, and to limit the engines and instruments of war to their legitimate use, — the fighting of battles and the blockading and protection of seacoasts.

Again, it is urged that the retention of this ancient right of capture and detention is necessary as the only means of bringing war to an end; that when you have destroyed the fleets of your enemy and conquered its armies, it has no object in suing for peace as long as its commerce and its communication by transportation with other nations in the way of trade is left undisturbed.

But this seems to us to be a purely fanciful and imaginary proposition. The history of modern wars and, in fact, of all wars shows that the decisive victory over an enemy by the destruction of his fleets and the defeats of his armies is sure to bring about peace. The test of strength to which the parties appealed has thereby been decided, and there is no further object in continuing the war.

The picking up or destruction of a few harmless and helpless merchantmen upon the sea will have no appreciable effect in reducing the government and nation to which they belong to submission, if the defeat of fleets and armies has not accomplished that result. Besides, there is a limit to the legitimate right of the victor upon the seas, for the time being, to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas, free for innocent and unoffending trade and commerce, and in the interest of mankind in general they must always remain so.

Again, it has been urged that the power to strike at the mercantile marine of other nations is a powerful factor in deterring them from war; that the merchants having such great interests involved, liable to be sacrificed by the outbreak of war, will do their utmost to hold their government back from provoking to or engaging in hostilities. But this we submit is a very feeble motive. Commerce and trade are

always opposed to war, but have little to do with causing or preventing it. The vindication of national honor, accident, passion, the lust of conquest, revenge for supposed affront, are the causes of war, and the commercial interests, which would be put in jeopardy by it, have seldom if ever been persuasive to prevent it.

And as to its continuance or termination, commerce really has nothing to do with it. When the military and financial strength of one side is exhausted, the war, according to modern methods, must come to an end, and the noncombatant merchants and traders have no more to do with bringing about that consummation than the clergymen and schoolmasters of a nation.

Once more, it is said that the bloodless capture of merchant ships and their cargoes is the most humane and harmless employment of military force that can be exercised, and that in view of the community of interest in commerce to which we have referred, and the practice of insurance in distributing the loss, the effect of such captures upon the general sentiment and feeling of the nation to which they belong is most effective as a means of persuading their government to make peace.

But we reply that, bloodless though it be, it is still the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and that it has no appreciable effect in reaching or compelling the action of the government of which the sufferers are subjects.

We appeal then to our fellow-delegates assembled here from all nations in the interest of peace, for the prevention of war and the mitigation of its evils, to take this important subject into serious consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly by the individual interest of the nations that they represent, but to determine what shall be for the best interest of all the nations in general, and whether commerce, which is the nurse of peace and of international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief real value of which has long since been extinguished.

In the consideration of such a question the interest of neutrals, who constitute at all times the great majority of the nations, ought to

be first considered; and if they will declare, on this occasion, their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any future exercise of this right, which is so abhorrent to every principle of justice and fair play.

II. GENERAL HORACE PORTER'S ADDRESS ON THE LIMITATION OF FORCE IN THE COLLECTION OF CONTRACTUAL DEBTS, JULY 16, 1907[1]

[The subject of the restriction of force in the collection of contract debts was called to the attention of statesmen and publicists by Dr. Luis M. Drago, Minister of Foreign Affairs of Argentine, in his remarkable dispatch, dated December 29, 1902, addressed to the Argentine minister at Washington, relating to the blockade of Venezuelan ports by the allied fleets of Germany, Great Britain, and Italy, in 1902.[2] The dispatch was the subject of great discussion,— indeed it may be said, universal discussion, — and it was unanimously

Resolved by the Third International Conference of the American states, assembled in Rio Janerio [in 1906], to recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.

Pursuant to this resolution, the United States reserved the right to bring the question before the Second Hague Conference, and on July 16, 1907, General Horace Porter, on behalf of the American delegation, delivered the following remarkable address, which had the double good fortune to explain and justify the convention adopted by the conference for the limitation of force in the collection of contract debts and to secure its adoption.[3]]

As delegates of a peace conference we are assembled here, charged with grave responsibilities, for the purpose not only of ameliorating the horrors of war, but of endeavoring to prevent wars by removing their cause.

There is a general and growing impression that the employment of armed force to collect unadjusted contractual debts from a debtor nation, unless restricted by some general international agreement, may become the most fruitful source of wars, or at least give rise to frequent blockades, threats of hostilities, and rumors of warlike intentions

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 1st Subcommission), Vol. II, pp. 229–233.

[2] For the text of this remarkable document, see Appendix, pp. 179–184.

[3] For the text of this convention, see Appendix, pp. 185–187.

calculated to interrupt commerce, affect the markets of the world adversely, create a feeling of uneasiness, and disturb not only the countries concerned in the dispute but neutral nations as well.

If the debtor nation resists, war becomes certain.

If so-called "peaceful blockades" are undertaken in order to force payments, there is an increasing disposition on the part of neutral commercial nations not to recognize them, and actual war has to be declared to make blockades effective.

This may lead to the landing of troops, the seizure of property and territory, and the violation of the sovereignty of an independent nation. If the occupation be prolonged, the question even of the balance of power may be raised, and many difficult, embarrassing, and complicated conditions may result.

Again, there may be other states having claims against the same country that would protest against the arbitrary seizure by a particular creditor of the property of the common debtor.

The case not unfrequently is that of an investor or a speculator who withdraws his services and his money from his own country to risk a venture in another with the sole object of increasing his private fortune.

If he gains millions, his government does not share in his profits; but if he loses, he demands that it go even to the extent of war to secure sums claimed to be due and often grossly exaggerated.

The onerous rates exacted confirm the belief that he is assuming an extra hazardous risk.

He not unfrequently purchases in the markets bonds of the debtor state at a low figure, and then makes his demand for payment at par.

In fact he is playing a game in which he expects to have recognized the principle of " Heads I win, tails you lose."

His foreign office, to which he appeals, has, generally speaking, no means at hand to make a thorough investigation of the subject, to procure and examine all the necessary documents, to inform itself as to the opposing evidence and form a correct judgment of the true merits of the case.

It has no jury to ascertain the facts, no competent and impartial court to guide it as to the law, no tribunal to pronounce upon the equity of the claim. In giving a decision the minister of foreign affairs must feel that he is violating a primary principle of the administration

of justice in admitting that a case may be adjudged solely by one of the parties to the controversy.

If by so serious a means as that of armed force the amount of the claim be secured, the taxpayers of the coercing nations have to bear the expense of enriching an investor or a speculator who has taken his chance of gain or loss in a foreign land, even if the cost of collection amounts to a hundred times the amount of his claim.

Perhaps there are no subjects which confront a foreign office that are more annoying and embarrassing than the pecuniary claims of individual subjects or citizens against a foreign government, stated at their own valuation and pressed for payment even though this may entail the formidable question of an act of war. If it were made known that investors and speculators undertaking financial negotiations with a foreign government were expected to deal upon the principle of *caveat emptor*, or if it were understood at least that their home government would not proceed to a compulsory enforcement of their claims until such claims had been adjudicated and their true value ascertained by a competent court of arbitration, and that the debtor nation had then arbitrarily refused to abide by the award, foreign offices would be relieved of one of the most vexatious and perplexing of their duties.

History records the fact that the great majority of such demands exhibit an exaggeration in the amounts claimed that is positively amazing.

Statistics show that in the last sixty years mixed commissions and courts of arbitration have examined thirteen large claims for damages, indemnities, unpaid contractual debts, etc., alleged to be due to subjects or citizens of one country by the government of another country. The greatest sum allowed in any case was only 80 per cent of the claim, while in some cases the lowest fell to the ridiculous figure of three fourths of 1 per cent.

On one occasion, one of our citizens having made a contract with a foreign government to perform certain services for it, difficulties arose in regard to the carrying out of said contract and it was annulled. The contractor took advantage of this to demand an indemnity of about $90,000, which was refused. He succeeded in persuading the United States government to take up his case, and, after much correspondence, many conferences, and tedious negotiations, to send

finally a fleet of nineteen war ships to support his claim. At last, after sixteen years of effort, our government, without succeeding in collecting a single cent, had spent more than $2,500,000 to achieve this result.

We considered this lesson not only instructive, but expensive. To use a familiar expression, "The game was not worth the candle."

It sometimes happens that the citizens of one power succeed in persuading their government to send a fleet to coerce another government, by reason of a default in the payment of interest on securities held by them. The knowledge of such a step causes a rise in the market. The holders take advantage of this to sell their securities abroad at a profit, so that after the claimant power has gone to the trouble and expense of forcing a payment, the benefit goes principally to foreigners.

These examples alone should forever deter civilized nations from resorting to arbitrary coercive measures for the enforcement of unadjudicated foreign debts, which leads to converting gallant soldiers into bailiffs and swapping human lives for dollars.

The resort to force of arms to collect such debts is a recognition of the now universally condemned doctrine that "Might makes right."

Such coercive measures are analogous to the practice formerly in vogue of imprisoning individuals for debt, except that no such action could be taken against the debtor until a competent tribunal had first granted a legal judgment in favor of the creditor. As the prisoner's maintenance became a charge upon the state, and his seclusion prevented him from earning any money with which to pay his debts, and even from providing for his family, so the blockading of a debtor nation's port and the destruction of its property by hostile fleets or armies interrupts foreign commerce, deprives it of its revenues from customs, and compels it, perhaps, to incur the expense of resisting force by force. This only serves to diminish its means of paying its debts.

The imprisonment of individuals for debt came to be regarded as illogical, cruel, and inefficacious, and has been generally abolished. The analogous practice of nations in the treatment of a debtor state should likewise be abandoned.

Coercive collections may result in enforcing payment at once, when the debtor nation may have so suffered from insurrections, revolutions,

loss of crops, floods, earthquakes, or other calamities beyond its power of prevention, that it has no means of making immediate payment but could meet all its obligations if given a reasonable time. There are instances of a number of states that, in the past, were at times unable to pay their debts when due, but which, when accorded reasonable time, eventually met all their obligations with interest and are now enjoying a high credit in the family of nations.

Neither the prestige nor the honor of a state can be considered at stake in refusing to enforce by coercive action the payment of a contractual debt due or claimed to be due to one of its subjects or citizens by another nation. There is no inherent right on their part to have a private contract converted into a national obligation. If so, it would be practically equivalent to having the government guarantee the payment at the outset.

The ablest writers upon international law consider that the state owes no such duty to its citizens or subjects, and that its action in such cases is entirely optional.

While these writers differ as to the expediency of intervention, research shows that a majority are of opinion that there exists no such obligation.

The following citations from the written opinions of eminent statesmen, diplomatists, and jurisconsults are valuable and instructive upon this subject.

Lord Palmerston, in 1848, in a circular addressed to the representatives of Great Britain in foreign countries, referring to the unsatisfied claims of British subjects who were holders of public bonds and money securities of foreign states, after asserting that the question as to whether his government should make the matter the subject of diplomatic negotiations was entirely a matter of discretion and by no means a question of international right, said:

> It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans of foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon. the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

In 1861 Lord John Russell, in a communication to Sir C. J. Wyke, wrote: "It has not been the policy of her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments."

Lord Salisbury in 1880 announced a similar policy. In a debate in the British Parliament — December, 1902 — during the controversy with Venezuela, Mr. Balfour, the Prime Minister, said:

I do not deny, in fact I freely admit, that bondholders may occupy an international position which may require international action; but I look upon such action with the gravest doubt and suspicion, and I doubt whether we have in the past ever gone to war for the bondholders, for those of our countrymen who have lent money to a foreign government; and I confess that I should be very sorry to see that made a practice in this country.

Alexander Hamilton, in the early days of the government of the United States, affirmed the same principles, saying:

Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

In 1871 Mr. Fish, then Secretary of State of the United States, wrote:

Our long-settled policy and practice has been to decline the formal intervention of the government except in case of wrong and injury to person and property such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts.

In 1881 Mr. Blaine, Secretary of State of the United States, wrote that a person

voluntarily entering into a contract with the government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into, for redress.

In 1885 Mr. Bayard, then Secretary of State of the United States, wrote in a dispatch on this subject:

All that our government undertakes to do, when the claim is merely contractual, is to interpose its good offices; in other words, to ask the attention of the foreign sovereign to the claim; and that is only done when the claim is one susceptible of strong and clear proof.

President Roosevelt in 1906 expressed himself upon this subject as follows:

> It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments. We have not considered the use of force for such a purpose consistent with that respect for the independent sovereignty of other members of the family of nations which is the most important principle of international law and the chief protection of weak nations against the oppression of the strong. It seems to us that the practice is injurious in its general effect upon the relations of nations and upon the welfare of weak and disordered states, whose development ought to be encouraged in the interests of civilization; that it offers frequent temptation to bullying and oppression and to unnecessary and unjustifiable warfare. We regret that other powers, whose opinions and sense of justice we esteem highly, have at times taken a different view and have permitted themselves, though we believe with reluctance, to collect such debts by force. It is doubtless true that the nonpayment of public debts may be accompanied by such circumstances of fraud and wrongdoing or violation of treaties as to justify the use of force. This government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple nonperformance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.

It appears that modern public opinion is decidedly opposed to the collection by force of contractual debts. The *American Journal of International Law*, in its first quarterly number of this year, says "the tendency among publicists is certainly toward the acceptance of the principle of nonintervention as the correct and normal or everyday rule of international law and practice."

Among modern authorities on international law who either deny the right of intervention or accept the principle of nonintervention with or without exceptions, the following may be cited: de Martens, Bonfils, Heffter, Woolsey, Wilson and Tucker, Walker, de Floecker, Liszt, Despagnet, Rivier, Nys, Mérignhac, and others.

It is not necessary to recall the early consideration and profound study given to this subject by the Argentine Republic, and the exhaustive discussion of the question and of kindred subjects contained in the writings of the former Secretary of State of that country, at present one of our highly esteemed colleagues in this conference.

The view of the majority seems to be that the correct rule of international law is nonintervention, but that intervention is either legally or morally permissible in extreme and exceptional cases.

Debt-collecting expeditions have seldom proved a success. In this age it is assuming a grave responsibility to relegate disputed money claims to the dominion of force instead of law, and substitute the science of destruction for the creative arts of peace.

The principle of nonintervention by force would be of incalculable benefit to all parties concerned.

First, to the nation whose subjects or citizens have become creditors of a foreign government, in that it would be a warning to a class of persons too apt to trade upon the necessities of feeble and embarrassed governments and then expect their government to become responsible for the success of their operations, as it would serve to discourage their transactions. It would enable the government to continue its normal relations with the foreign state, avoid incurring its ill will and suffering perhaps a loss of its commerce. Such an attitude would also save it from all risk of complications with neutral powers.

Secondly, the recognition of this principle would be a substantial relief to neutrals, the interruption to whose commerce by blockades and hostile operations becomes a serious menace to their foreign trade.

Thirdly, it would be of advantage to the debtor states, as it would be an announcement to the lenders of money that they would have to base their operations solely upon considerations of the good faith of the government, the national credit, the justice of local courts, and the economy practiced in the administration of public affairs. This would relieve such states from the importunities of the speculative adventurer who tempts them with the proffer of large loans, which may lead to national extravagance and in the end threaten the seizure of their property and the violation of their sovereignty. The knowledge that all disputed pecuniary claims would be subject to adjudication by an impartial tribunal would be apt to lead prominent bankers and contractors to feel that such claims would be settled promptly without serious disturbance to the administration of the country's public affairs, and without the necessity of assuming the task of prevailing upon their government to undertake the collection of their claims by force of arms. In such case responsible financial men and institutions abroad would be more likely to negotiate loans and make their terms fair and reasonable. The Permanent Court of Arbitration at The Hague would naturally be given the preference in selecting for the settlement of such claims an impartial tribunal.

One significant feature of this conference is that for the first time in history the creditor and the debtor nations of the world are brought together in friendly council, and it seems a singularly appropriate occasion for an earnest endeavor to agree upon some rule concerning the treatment of contractual debts which may commend itself to all here assembled and result in a general treaty on the subject among the nations represented.

No experienced statesman can doubt that a question which, if left open, may work so much evil in exciting and disturbing the commonwealth of nations by threats, rumors, and declarations of war will some day be removed from the causes of armed conflicts; and if the present conference, from which so much is expected by the onlooking world, neglects this proffered opportunity of accomplishing such a beneficent result, it will record a regrettable failure and lose the credit of having performed a far-reaching act in the true interests of the world's peace.

III. ARBITRATION AT THE SECOND HAGUE CONFERENCE

1. MR. CHOATE'S ADDRESS ON THE AMERICAN PROJECT OF INTERNATIONAL ARBITRATION, JULY 18, 1907[1]

[International arbitration has become within the past century a favored method of settling disputes between nations, which diplomacy has failed to adjust. Since the negotiation of Jay's Treaty in 1794, Articles 5, 6 and 7 of which provided for three mixed commissions for the settlement of outstanding difficulties between Great Britain and the United States, there had been, before the meeting of the First Hague Conference, numerous instances of arbitration: some four hundred, according to Dr. Darby; some one hundred and thirty, according to the more conservative estimate of Professor John Bassett Moore. The First Hague Conference recognized arbitration as the most equitable as well as the most efficacious method of deciding controversies which diplomacy had been powerless to adjust, and the partisans of arbitration in the First Conference endeavored to negotiate a treaty or convention by which the nations represented at the conference should bind themselves to arbitrate controversies unadjusted by diplomacy. The unwillingness of Germany to accept any obligation to arbitrate, even although questions involving vital interests and national honor were excluded, necessitated the withdrawal of the proposition in a conference where the principle of unanimity as opposed to majority prevails.

The negotiation of more than thirty treaties of arbitration between the adjournment of the First Conference and the meeting of the Second seemed to justify the belief that a general treaty of arbitration would be adopted at the Second Conference; for it appeared quite probable that the nations would be willing to assume an obligation in a single document which many had agreed to by separate instruments. The presence of Latin America, with instructions to favor a general treaty of arbitration, assured a favorable majority in the conference; and it was expected that the experience of nations with arbitration, and the conclusion of numerous treaties providing for it, would persuade if it did not wholly convince its opponents. Pursuant to direct instructions from the Department of State, Mr. Choate introduced on July 18, 1907, a proposal for a general treaty of arbitration and supported it in the following address.[2]

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 1st Subcommission, July 18, 1907), Vol. II, pp. 260–263 (265–267).

[2] For the text of the American proposal see Appendix, p. 188.

It will be noted that the American proposition excluded from the obligation to arbitrate, questions involving independence, vital interests, and honor of the contracting parties, and provided further that the compromis, that is to say, the issue submitted to arbitration, be framed in accordance with the constitutions and the laws of the contracting parties. The reason for this reservation will sufficiently appear in Mr. Choate's address, as well as in Mr. Scott's addresses. As in 1899, so in 1907, the opposition of Germany proved fatal. Baron Marschall von Bieberstein admitted the principle of obligatory arbitration, but opposed a treaty containing the reservation of independence, vital interests, and honor, on the ground that their presence made the obligation illusory. He likewise refused to accept the Anglo-American draft convention, which provided for a series of seemingly innocuous subjects, and which might safely be submitted to arbitration without these reservations. This project was acceptable to thirty-two of the forty-four states represented at the Second Conference, and would have been adopted had Germany withdrawn its opposition.[1]]

Mr. President:

In presenting our scheme for a general agreement of arbitration among the nations I desire to preface it with a brief statement explanatory of the position of the United States of America upon the subject, in the hope of commending it to the general acceptance of the nations taking part in the conference.

The dangers which threaten the world from the constant and progressive preparation of all the great nations for war, and from the constantly increasing power and burden of their armaments, which were so strikingly portrayed in the rescript of his Imperial Majesty, the Emperor of Russia, of August 24, 1898, and in the circular letter of Count Mouravieff, of January 11, 1899, were mitigated to a certain extent by the excellent work of the First Peace Conference of 1899.

That conference, it is true, did not see its way to adopt the specific remedy suggested by his Imperial Majesty, but it took a great step forward in providing what it deemed to be the only practical remedy,— in commending arbitration to all the nations of the world as the true method of settling their differences, and establishing a court before

[1] Nine states voted against the project,— Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Montenegro, Roumania, Switzerland, Turkey. Three abstained from voting,—Italy, Japan, Luxemburg (*La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, p. 121).

It should be said that the first two and principal articles of the original American proposition, forming the first two articles of the draft convention, were adopted by a vote of thirty-five to five against (Germany, Austria-Hungary, Greece, Roumania, Turkey), with four abstentions (Japan, Luxemburg, Montenegro, Switzerland) (Ibid., p. 90).

which such arbitration might, at the pleasure of the parties, be submitted and decided. The principle of arbitration was firmly established, and it was expressly agreed that in questions of a judicial character, and especially in questions regarding the interpretation or application of international treaties or conventions, it was recognized by the signatory powers as the most efficacious, and, at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic method. And the establishment of the court of arbitration, as a first step in the plan of carrying arbitration into effective operation among nations, was one of the greatest advances that have yet been made in the cause of civilization and of peace.

But, Mr. President, great events have happened since the close of the First Peace Conference, which have attracted the attention of the world and convinced it of the necessity of taking another long step forward and of making arbitration, as far as human ingenuity can do it, a substitute for war in all possible cases. Two terrible wars have taken place, each productive of an incalculable amount of human suffering and misery, and these wars have been followed by a steady increase of armaments, which offer a convincing proof that the evils and mischiefs which the Russian emperor and Count Mouravieff deplored, are still threatening the peoples of all the countries, and that arbitration is the only loophole of escape from all those evils and mischiefs. So thoroughly have all the nations, great and small, been convinced of this proposition that many of them have made haste to interchange with other individual nations agreements to settle the very questions for which arbitration was recognized by the last conference as the most efficacious and equitable remedy, by that peaceful method instead of by a resort to war. I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect. In 1904 the United States of America, beholding from a distance the disastrous effects of those terrible conflicts of arms from which they were happily removed, proposed to ten of the leading nations to interchange treaties with them of the same nature and effect. Their proposition was most cordially welcomed and ten treaties were accordingly negotiated and exchanged, but failed of ratification by an internal domestic question which arose between the different branches of the treaty-making powers of the United States. But all parties were of one mind that all the questions for

which arbitration had been recommended by the former conference should be settled by that method rather than by resort to arms, and that the Hague Court should be the tribunal to which they should be submitted.

In 1901, at the Second International Conference of the American States, held in Mexico, to which the United States was a party, an obligatory convention was entered into and signed by all the parties taking part in the conference, by which they agreed to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels when said claims are of sufficient importance to warrant the expenses of arbitration, and that the Hague Tribunal should be the court for the trial and disposition of all such controversies unless otherwise specially agreed. And in case, for any cause whatever, the Permanent Court of The Hague should not be open to one or more of the high contracting parties, they obligated themselves to stipulate in a special treaty the rules under which the tribunal shall be established for taking cognizance of the questions to be submitted.

This convention was for five years, and was ratified by eight of the parties, including the United States of America.

Later still, at the Third International Conference of the American States, held at Rio in 1906, for the holding of which this meeting of the Second Conference at The Hague was, by the courtesy of the signatory parties, postponed until the present year, the Mexican treaty was renewed for a further period of five years by all the parties that had ratified it and by all the other countries in the conference, and is now being ratified by them one after the other.

At the Rio conference the subject of a still further extension of obligatory arbitration was again considered, and at that time all the parties to that conference had been invited to take part in this Second Conference at The Hague. And in view of that fact, and of a general desire on their part to defer to the judgment of this present conference, the committee to whom the matter was referred, reported a resolution to ratify adherence to the principles of arbitration and, to the end that so high a purpose may be rendered practicable, to recommend to the nations represented that instructions be given their delegates to the Second Conference to be held at The Hague to endeavor to secure by

said assemblage of world-wide character the negotiation of a general arbitration convention so effective and definite that, meriting the approval of the civilized world, it shall be accepted and put in force by every nation. The conference unanimously ratified the report of the committee and the United States was a party to the ratification.

It is under these circumstances that the delegation of the United States of America comes here instructed by its government to advocate the adoption of a general treaty of arbitration substantially to the tenor and effect of the treaties which it entered into in 1904, to which I have already referred, and which became abortive by the circumstance already mentioned.

Happily, Mr. President, we are encouraged in the presenting of this treaty by your own wise suggestion in the eloquent address with which you opened the first meeting of the First Commission, that, inasmuch as many of the nations had now separately agreed in pairs, one with the other, to the submission of the same questions to arbitration, to be disposed of by the Hague Tribunal, it might now be timely, as well as possible, for them all to enter into the same treaty together and so make this further step forward in the cause of arbitration a world-wide movement. There seems to be no intelligent reason why nations having grave interests at stake which may come into possible difference, and who have already separately agreed to submit such differences to arbitration before the Hague Tribunal, should not all together agree to exactly the same thing, and why other nations should not follow them in the paths of peace so happily inaugurated.

In conclusion, Mr. President, it is only necessary for me to call the attention of the subcommission to the particular articles of our proposed treaty.

Article 1 provides that differences of a judicial order, or relating to the interpretation of treaties which have not been able to be settled by diplomatic methods, shall be submitted to the Permanent Court of Arbitration at The Hague, always provided that they do not involve vital interests or the independence or honor of either of the states, and that they do not affect the interests of other states not parties to the controversy.

Article 2 provides specifically and expressly what might have been necessarily implied without any such expression, that it shall be for

each of the powers concerned to decide for itself whether its vital interests, or independence, or honor are involved.

Article 3 provides that, in each case that may arise, a special agreement or protocol shall be concluded by the parties in conformity with the constitution or laws of the respective parties determining precisely the subject of the litigation, the extent of the powers of the arbitrators and the procedure and details to be observed in whatever concerns the constitution of the arbitral tribunal.

The form of this article is rendered necessary by the constitutional needs of securing for every such agreement or protocol, before it can become effective, the approval of some other department of the government besides the one which signs the agreement as a part of the treaty-making power; for instance, in the United States, the Senate of the United States, and, as is believed, other departments of government in many other states.

Article 4 provides for the ratification of the treaty and its communication to the other signatory powers.

And Article 5 provides for the effect of a denunciation of the treaty at any time by either of the parties to it.

Thus, Mr. President, we offer a plan by which the conference may enter into a general convention, which ought to be entirely distinct and independent, for the settlement by arbitration among all the powers of such questions as shall come within its scope. We believe that it will satisfy a world-wide demand for such a treaty and will go far to promote the cause of arbitration, which all the nations are every year expecting more and more confidently as a substitute for the terrible arbitrament of war.

At the proper time, Mr. President, I shall ask an opportunity to explain our view of the project we have offered for fortifying the present Permanent Court of Arbitration and building up out of it a tribunal which shall compel the confidence of the nations, and which will be the necessary sequel to the general arbitration agreement which we now offer.

2. MR. SCOTT'S ADDRESS ON THE COMPROMIS CLAUSE IN THE AMERICAN PROJECT OF INTERNATIONAL ARBITRATION, AUGUST 31, 1907[1]

[The ordinary treaty of arbitration provides that

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the high contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration.

By virtue of the treaty the contracting parties bind themselves in advance to submit controversies of the specified character as they arise, but, as the questions at issue have to be carefully determined before they can be submitted to a tribunal of arbitration, it is necessary that a special agreement, usually termed the compromis, be negotiated, which shall define clearly the matter in dispute. This special agreement should be and is framed with the greatest care, because upon it depends the judgment of the court, and it is often reached only after prolonged negotiation between the contracting countries. In some states the chief executive is competent to frame the issue. This is particularly so in monarchical countries. In others the chief executive negotiates the compromis but requires the coöperation of the legislative body. This is particularly so in republican forms of government. Secretary Root in his instructions to the American delegation directed that "in signing the general arbitration treaty the delegates of the United States desired to have it understood that the special agreements provided for in Articles of said treaty will be subject to submission to the Senate of the United States." In accordance with this direction the American project of international arbitration contained an article to the effect that the special agreement (compromis) should be framed in accordance with the constitutions and laws of the contracting states, thereby reserving the right to submit the compromis to the Senate if the President should deem it necessary or advisable. This provision of the project gave rise to prolonged and animated discussion in the conference, but after much opposition it was maintained in the Anglo-American project voted by the commission but ultimately dropped, owing to the determined and unyielding opposition of Germany and of Austria-Hungary. The attitude of the American delegation has been sustained by the President, and in the twenty-four treaties of arbitration negotiated by Secretary Root in the last year of his tenure of office the compromis clause appeared in the following form:

"It is understood that such special agreements on the part of the United States will be made by the President of the United States by and with the advice and consent of the Senate thereof."

[1] *La Deuxième Conférence Internationale de la Paix* (1st Commission, Committee of Examination A, August 31, 1907), Vol. II, pp. 517–519.

In order to meet the scruples of those states that fear they will be bound by their compromis even although it is not accepted by the United States, the following clause has been inserted in a number of such treaties:

"Such agreements shall be binding only when confirmed by the governments of the high contracting parties by an exchange of notes."

This clause seems unnecessary because it is evident that neither party can be bound unless both are; but its insertion, however unnecessary, seems to have overcome the opposition of certain states to the compromis. It is interesting to note that Austria-Hungary, notwithstanding its hostility to the compromis clause, concluded a treaty of arbitration with the United States on January 16, 1909, containing the right to submit the compromis to the Senate. A little more time and reflection will perhaps convince Germany, Austria-Hungary's ally, of the futility of opposition to an agreement negotiated by the President and ratified in accordance with the Constitution and the laws of the United States.]

The Convention of 1899 for the Pacific Settlement of International Disputes prescribes in Article 31 the following method for framing the compromis, that is to say, the question at issue:

> The powers which have recourse to arbitration sign a special act (compromis) in which the subject of the difference is clearly defined, as well as the extent of the arbitrators' power. This act implies the undertaking of the parties to submit loyally to the award."

Article 3 of the American project lays down the principle that the compromis required by Article 31 shall be framed in accordance with the laws and constitutions of the signatory powers:

> In each individual case the high contracting parties shall establish a special compromis conformably to the constitutions or laws of the high contracting parties, determining clearly the object of the controversy, the extent of the powers of the arbitrator, the procedure and the details to be observed in the constitution of the arbitral tribunal.

In considering the compromis we must be careful not to exaggerate its importance and make it the matter of supreme moment, to the detriment or exclusion of the treaty, for the compromis depends upon the treaty and has no independent existence. If there is no treaty, there can be no compromis. If we consider the nature of the treaty as an international act, we shall be better able to appreciate the nature and importance of the compromis.

A treaty is an agreement between two or more nations both willing and able to agree. A contract is the solemn expression in legal form

of the realized intention of the parties. If concluded between individuals, it is a contract of private law; if concluded between states, it is a public contract to which we give the name of treaty. The act of the parties expressed in terms of law carries with it the obligation to do or not to do a particular act, and pledges their good faith to the performance of the act in all its parts. There are two kinds of treaties. The first creates a status complete in itself without further action on the part of the contracting parties. There is, however, a second class which creates mutual rights and duties and binds each party to the strict observance of its terms. It is only necessary to cite the instance of the treaty providing for the payment of a sum of money. Such a treaty obligates the contracting party to raise the sum required in accordance with the rules of its internal organization, and to pay the debt in order to extinguish its obligation. It is the treaty that creates the international obligation, but its execution depends upon the coöperation of a branch or department of the internal administration. Whether this internal organ be composed of one or many persons is a matter of indifference to international law, for international law has nothing to do with the domestic machinery by which or through which the international duty is performed.

But to return to the compromis. We shall suppose that the contracting parties foresee that the interpretation of the treaty and consequently its execution may give rise to a divergence of views, perhaps to serious disagreement. They therefore agree in advance to adjust their differences peaceably and provide by arbitration an impartial and final settlement. But in order to submit the controversy to arbitration it is necessary that the parties agree upon the issue or the question to be submitted. This is the substance and essence of the compromis as prescribed by Article 31 of the Convention for the Pacific Settlement of International Disputes, and by Article 3 of the American project.

The formulation of the issue is the result of negotiation and is only reached when the parties in conflict are agreed upon the points in controversy. If the claims of state A are unreasonable, it cannot be expected that state B will accept them, nor can we hope for an agreement if the counterclaims of state B are unacceptable. It is only when negotiation has succeeded in eliminating all questions foreign to the controversy, and in ascertaining the exact question in dispute, that we have the basis of a settlement, and it is only when the formulation of

the object and the exact determination of the issue are accepted by both parties that an agreement exists. To become binding it is necessary that the projected agreement be ratified in each of the states by the department or body charged with the conduct of foreign affairs. This may be a single individual, the responsible head of a state, or the chief executive acting in coöperation with an internal body or branch of the government. For example, in the United States this power is lodged with the President by and with the advice and consent of the Senate. In any case the proposed accord is not binding until ratified by the competent power, and this competent power or branch of the government is determined by the constitutions and the laws of the contracting parties. It is no doubt true that a single body or person will act more rapidly than a numerous body or complex organ, but it is not the domestic organ ; it is the accord which interests us, for the organ, as previously stated, is indifferent to the eyes of international law. The moment that an obligation exists the channel through which it is executed has only an academic interest. In order that this point may be clearly understood and that no misunderstanding may arise by reason of the delay incurred by the cooperation of the domestic machinery, the United States has declared in clear and unmistakable terms that the formulation of the compromis depends upon the cooperation of the branch of the government competent to negotiate treaties. In America this is the province of the chief executive and the Senate. It may not always be necessary to submit the compromis to the Senate, and in practice this is not ordinarily done. The recent agreement to arbitrate the controversy arising out of the question of the Pious Funds and the compromis submitting the Venezuelan difficulties to arbitration were not submitted to the Senate. But we desire to reserve the right to submit the compromis to the Senate and we notify the contracting powers of the reservation.

The refusal to accept an unreasonable compromis is not and cannot be a violation of a treaty. On the contrary, it is unreasonable to suppose that an unreasonable claim or pretension will be accepted as presented. The rejection of an unreasonable claim or pretension is not a breach of the contract, for the parties only bound themselves to accept a reasonable claim or pretension arising out of and connected with the contract. The refusal to accept merely means that the claim is unacceptable because it is unreasonable, and it is only when the

claims and counterclaims are acceptable to the contracting parties that we can expect a compromis to be ratified. It is not to be supposed that a government will reject an acceptable proposition. No single case of this kind has arisen in our history, and the question is and must remain purely academic. It is doubtless true that a treaty creates an obligation, a *juris vinculum*, but the refusal to agree to a compromis containing an unreasonable demand is no breach of a treaty imposing the acceptance of a reasonable contention. It is simply the rejection of an unacceptable compromis, not the breach of the treaty creating the duty to negotiate a compromis. The compromis is the result of the negotiation between two states upon the footing of absolute legal equality, from which it follows necessarily that each state is the sole judge whether the proposed compromis is or is not acceptable.

If, therefore, any state wishes to reserve *expressis verbis* the right to frame the compromis in accordance with its constitutional and legislative provisions, we admit fully and without question the propriety and indeed the legality of the demand. For us the reservation is self-evident and arises from the very nature of things; but in order to prevent a possible misunderstanding which might engender incrimination and recrimination and cause our good faith to be questioned, we have considered it necessary to state fairly and squarely the situation as it exists in the theory and constitutional practice of our country.[1]

3. MR. CHOATE'S ADDRESS ON THE ANGLO-AMERICAN PROJECT OF INTERNATIONAL ARBITRATION, OCTOBER 5, 1907[2]

[After weeks of discussion in the Committee of Examination A, the Anglo-American draft of a general treaty of arbitration was presented to the commission and was there debated with a warmth of feeling that at times suggested a parliamentary assembly rather than an international conference composed of diplomatic representatives. The essential portions of the original American proposal appeared in the draft presented by the

[1] In a subsequent discussion of the same question Mr. Scott remarked: "Doubtless the objection based upon the constitutional organization of certain American states has greater weight with the adversaries of the principle of obligation than with its persistent advocates. The danger is purely academic and nonexistent except in the minds of those opposed to obligatory arbitration, and who seek an indirect means of defeating it. We are ready to sign a treaty of obligatory arbitration and we insist that for its execution confidence be placed in our good faith just as we trust to the good faith of others" (*La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, p. 523).

[2] Ibid. (1st Commission, October 5, 1907), Vol. II, pp. 72–77 (91–95).

Committee of Examination. For example, Article 16, *a*, submitted to arbitration "differences of a legal nature and primarily those relating to the interpretation of treaties existing between two or more of the contracting nations," reserving from the obligation to arbitrate, questions involving independence, vital interests, and honor of the contracting nations; each signatory was to be the sole judge of the presence of independence, vital interests, and honor involved in the question proposed for arbitration (Article 16, *b*), and the compromis, that is, the issue submitted to arbitration, was to be concluded "in conformity with the respective constitutions or laws of the signatory powers." In addition, the convention recognized "that certain of the differences contemplated in Article 16 are of a nature to be submitted to arbitration without the reservation" of independence, vital interests, and honor, and enumerated the following list of differences which were to be arbitrated without invoking reservations of any kind.

Following out this idea, they agree to submit the following differences to arbitration:

I. Disputes concerning the interpretation and application of conventional stipulations relative to the following matters:

1. Reciprocal gratuitous aid to indigent sick.
2. International protection of workingmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of vessels.
6. Wages and estates of deceased sailors.
7. Protection of literary and artistic works.

II. Pecuniary claims on account of injuries, when the principle of indemnity is recognized by the parties (Article 16, *d*).

Provision was made by a subsequent article of the draft by which subjects enumerated in the protocol accompanying the convention might be added to it and included in its ratification. The American delegation preferred its original proposal, based upon the Anglo-French treaty of October 14, 1903, which had commended itself to partisans of international arbitration, but gave way to the sentiment in favor of including lists of subjects with specific renunciation of the customary reservations. In doing so, however, the delegation was careful to reserve the right of the Senate to pass upon the subjects so included. Acceptable to thirty-two states and opposed by nine, the draft convention would probably have been adopted unanimously but for the opposition of Baron Marschall von Bieberstein.[1] He was, however, unwilling to negotiate a general, preferring an individual treaty between carefully selected states; he opposed the reservation of independence, vital interests, and honor, as rendering the obligation to arbitrate illusory; and insisted that the submission of the compromis to an internal or legislative body other than to the executive

[1] For the text of the Anglo-American draft convention, see Appendix, pp. 189–192.

placed the contracting countries upon an inequality. The following address of Mr. Choate deals with each of these objections. The Baron's opposition to the protocol of additional subjects was answered in a masterly address by M. Louis Renault, to which Mr. Choate referred in the course of his argument.]

Mr. President:

It is now ten weeks since I had the honor to present, in the name of the delegation of the United States of America, the projet for a general agreement of arbitration which is to-day before the consideration of the committee. It has, I think, erroneously been called a projet of a convention for "obligatory" arbitration. In my judgment the true name for it should be a projet for a "general" convention of arbitration. There is nothing any more obligatory about it than there is in any other agreement of arbitration, whether between two individual states or several. It is obligatory upon them from the mere fact of their agreeing, in the one case as in the other. The *Comité d'Examen* to which the projet was sent, has very carefully discussed it, clause by clause and article by article, and in spite of all the efforts made to defeat it and to reduce it to an impossible minimum, the proposition, modified in only two important points of view, — the introduction of a brief list of subjects in respect to which the honor clause should be waived, and the addition of the article providing for a protocol, — has finally received the hearty support of the *Comité*.

I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the conference. But with all this deference it seems to me that either there are, in this conference, two First Delegates of Germany, or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm

for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

But seriously. What response has been given to our proposition? What is the fatal obstacle that we find in the way? How is all this desire to accomplish arbitration, so dear to the hearts of all the nations, manifested in fact? What hindrance is there to carrying out the purpose so general among all the nations? If the United States, France, Germany, Great Britain, and Russia, and a number of other nations can exchange individual treaties with each other for the purpose of arriving at the desired result, — a result which we all profess to desire, — why is it not possible to arrive at the same accord in a general way, by means of a mondial treaty?

But if we yield to the suggestions of the First Delegate of Germany, it is absolutely necessary for us to limit ourselves to individual treaties with each other and to come to a dead stop at the very suggestion of a general mondial arbitration agreement. That is the very question. If each nation can agree with each other separately, why cannot each agree to the same thing with all the rest together? They accept our projet of an arbitration agreement on the sole condition that it be individual and not general in the form it takes, and that it never shall be a world-wide general agreement. Why? Yes, Why? I ask. Why cannot a nation which is ready to enter into an arbitration agreement or agreements as to certain subjects with twenty other states come to a similar agreement with all the forty-five, if such is the imperative desire of the nations? Let Germany answer the question. The rest of us are ready to conclude a general convention in this sense because we have absolute confidence, each of us, in all the other nations. We respect the equality of all the other powers upon the basis upon which they are represented and on which they exercise suffrage in the conference. We recognize by their conduct here their equal manhood, intelligence, independence, and good faith. There are really two questions here, — one of confidence or good faith and the other of a resort to force.

It has been truly said by Baron Marschall that the immediate result of the conference of 1899 was to stimulate and advance the cause of arbitration throughout the world. You remember, gentlemen, how quickly after the conclusion of the labors of that conference a great

number of important powers gave in their adhesion to the principle by exchanging individual treaties of arbitration of exactly the same tenor as that which now lies before you. We hope that the same will be the case this time, for I am sure that our labors, however imperfect the results may be, will at least still further advance the world-wide desire for arbitration and a resort to it as a universal substitute for war. And I predict that if we, who have sufficient confidence in each other, shall enter into this treaty that is now proposed, the German government itself, even if it decides for the present not to sign, will soon be ready to adhere with the rest, and will not only be ready, but will eagerly seek, to be admitted to the universal compact. She, with her enthusiasm for the principle of arbitration, will not be willing to be left out in the cold, but will be eager to unite with the majority.

We have learned much in the protracted labors of the conference, but the best thing that we have learned is this confidence in each other and how the nations who have united in its labors are entitled to equal credit for honest intention and good faith.

Now as to the question of the reservation of the right or the purpose to resort to force, which is the only other reason that I can conceive of for declining to join in a general arbitration agreement on the part of those who are ready to accomplish the same thing by individual treaties. The idea of the opposition, as I understand it, is that we should maintain our right to select our own company, and not be compelled to admit all the nations into a general agreement with us. But suppose you do agree with twenty nations and conclude such treaties with that limited number, either separately or jointly, what do you mean to do with regard to the twenty-five other nations whom you will have refused to admit into your charmed circle of arbitral accord? You must reserve, must you not, you must mean to reserve, the right to resort to war against the twenty-five nonsignatory states, when differences with them cannot be settled by diplomatic means? Those are the two alternatives always, — arbitration or force. And if you will not agree to arbitration, it must be because you reserve the right, if not the intent, to resort to force with them. But, gentlemen, empires and kingdoms, as well as republics, must sooner or later yield to the imperative dictates of the public opinion of the world. Every power, great or small, must submit to the overwhelming supremacy of the

public will, which has already declared and will hereafter declare, more and more urgently, that every unnecessary war is an unpardonable crime, and that every war is unnecessary when a resort to arbitration might have settled the dispute. These are the two alternatives between which the opponents of our projet must finally choose.

The projet, as we presented it some weeks ago, is not new. We do not claim the credit of inventing it. We have borrowed its language from other powers, as, for example, from Germany, from Great Britain, and from France, from treaties which they had already concluded with each other. If it is not perfect, the responsibility for its imperfections rests on those powers as well as on ourselves.

After the masterful discourse of M. Renault, to which we have just listened, there remain very few points for me to make clear. Baron Marschall is of opinion that the term " questions of a juridical nature " is obscure. But during the discussion of the even more important projet relative to the establishment of the *cour de justice arbitrale*, in which he was our cordial colaborer, this difficulty was not raised.

It may be at times difficult to distinguish a juridical question from a political question, but the difficulty is the same in the application of individual treaties as in that of a general treaty, and this objection, like almost all the others which Baron Marschall has raised, applies equally to both kinds of treaties.

Again it has been urged, in support of the position, that a nation may make a general treaty with twenty states and yet refuse to extend it to the forty-five ; that the same difference arising between A and B may be of a juridical nature, and arising between C and D may bear a political character. Our projet contains in itself the reply to that objection. If, on the difference arising between A and B, the question is of a juridical character, the treaty by its very terms will apply. If the same question, when it arises between C and D, proves to be, as it is claimed that it may be, a political question, the very terms of the treaty will exclude it.

The only reason why M. Baron Marschall prefers individual treaties to a mondial treaty is that the latter does not leave to each party the choice of its cosignatories. To this I answer : " The whole matter is one of mutual confidence and good faith. There is no other sanction for the execution of treaties. If we have not confidence one with another, why are we here ? " There is no other rule among us than that

of mutual good faith. That is the only compelling power which can restrain or enforce our conduct as nations. If we feel that we cannot trust each other, that is a conclusive reason for refusing to enter into treaties of arbitration with the rest. If we can, it is our solemn duty to do so, and thereby substitute arbitration for war as the world demands.

A single word now as to the perpetual hue and cry that the opponents of our projet have raised as to the necessity of every compromis being subject to the approval of the Senate of the United States, and the baseless plea that this makes a lack of equality or reciprocity between us and other states who may enter into this treaty with us.

Without doubt, in certain cases, for the execution of the convention by the establishment of the compromis the coöperation of several departments of a state will be necessary. As with the United States, so with almost all the other nations, and there is no international executive power to compel them to make it, but it is certain that the several branches of government, whose coöperation is in each case constitutionally required for the making of the compromis, will comprehend their duty to honor their international obligations, and we have not the right to question their good faith.

The same question of the compromis will always arise under every treaty, whether individual or general, because it is the only method known to diplomacy for settling the terms of the arbitration that has been agreed upon, and whatever may be the constitutional requirements as to the need of the coöperation of coördinate branches of the respective governments in making it. The making of it will always be a matter between government and government, and it is no concern of either government whether the other will have to act or sign by one or two or three branches to make it valid. The same difficulty in settling the terms of the compromis may be raised by a single foreign office, or by either of however many branches of government whose concurrence may be necessary.

If we begin now with a restricted number of obligatory arbitration cases, as our projet proposes, there is no doubt that before the next conference meets the number will be considerably augmented by additions under the article providing for a supplementary protocol. At the same time it is clear that a mondial treaty will not prevent the powers from continuing to conclude among themselves individual

conventions of arbitration, under all of which the same inevitable necessity for a compromis will always recur. But in signing a mondial convention, does a nation renounce absolutely the choice between arbitration and force? If one of the parties should refuse to conclude the compromis or to execute the award, the other has always the same right of recourse to force which it ever had if no treaty had been made. In that case the only question will be, whether it will venture upon that extreme remedy, in defiance of public opinion, or will have patience still and make further amicable efforts to bring the adversary to reason.

So far as regards the compromis, the arguments of the opponents of the projet have been refuted by the words, as logical as they are eloquent, of M. Renault. Whether it is a question of an individual arbitration treaty or a mondial treaty, a compromis, as he has shown, will always be necessary. At the same time he has conclusively shown that the United States, by reason of the fact that the Senate must approve the compromis, is not less bound than other powers by a general treaty of arbitration. He has manifested a masterly knowledge of the force and effect of the detailed provisions of our Constitution and of its general working. No American lawyer could have explained it better.

Sometimes the settlement of the terms of the compromis is the most important question involved in the treaty and in its execution, as has been well illustrated by M. Renault in the case of the Alabama Claims, which resulted in the Geneva arbitration, where the settlement of the compromis is generally believed to have really settled the case and compelled the decision which was subsequently made by the arbitrators. That is why the United States, as well as Great Britain, in the examination of the projet for the creation of the *cour de justice arbitrale*, refused to intrust the special committee with the settlement of the compromis, preferring to reserve the right to themselves to make their own international bargains in matters so important.

Again we have heard from Baron Marschall a new illustration drawn from the "open door." Three or four years ago we used to hear a great deal about the "open door," but of late the whole world has been silent on the subject until our distinguished friend brought it up for illustrative purposes on the present argument. The making of the treaty, he says, always leaves an inner door to be passed through, to

wit, the making of the compromis; and, he says, to this door each of the high contracting parties holds a key, and when one of them presents himself with his key for the opening, the other may come and say, "I cannot open my lock with my key because my Senate has got the key." Well, the Senate is just as essentially a part of the power that holds the key for the United States as the President is, and until they are both ready to give the word, the door cannot be opened. But so it is with every government which requires the concurrence of more than one branch to the making of the compromis; and the same difficulty arises if the foreign secretary of one party, who is enabled to act alone, says, "I am not ready to produce my key."

A sufficient reply has been given by M. Renault. It is not a question of knowing whether there are several keys, but whether the door is open or closed. From the moment when the arbitration treaty is concluded, each party is bound to unlock the door for both to pass through upon reasonable terms. One party cannot settle for the other what terms are reasonable, and until both parties agree, the compromis is not settled and the door is not open, whether the settlement of the compromis and of the opening of the door depends on the Senate, an executive council, a parliament, a sovereign, or any other administrative entity. Always, as I have so frequently insisted, it is a question of good faith in the action of the government on either side, however that government is constituted. Arbitration is concluded not between two or more underlying administrations of government, but between the two states, between the two powers, as distinct national entities, and the carrying out of every step is between them.

This atmosphere of mistrust or distrust in which it has been sought to envelop the whole question ought to be cleared away. It is the most noxious atmosphere in which international questions can be discussed in an international conference, and it ought to give place to the mutual spirit of abiding confidence and good will. For the government that I represent, I can best dispel it by a reference to our past, which answers more eloquently than any words of mine can do, all the objections that have been raised. During the last fifty years the United States have, I believe, concluded as many treaties of arbitration as any other power, and never in one instance has it failed to conclude the compromis required by the treaty. From the moment the arbitration agreement has been entered into which required the

compromis, it has regarded the making of it on reasonable terms as a national necessity and the imperative requirement of good faith. And should it continue as a nation for a thousand years to come, it will never fail to honor its engagements, and the Senate, in the future as in the past, will ever be ready to complete the compromis in the spirit that the treaty requires.

Throughout the world the necessity of general arbitration is felt and proclaimed. The joint action of all the states of America, North and South, at the Pan-American conferences at Mexico and at Rio de Janeiro, demonstrates that all the states of America are of one mind, that the whole western hemisphere is a unit on this subject, and with one voice aspires to conclude a mondial convention for the settlement of international disputes as preventive of war. If in this great cause you will lend us your cooperation, you will sustain the interests of humanity and civilization, and by the unanimous adoption of our projet we shall grandly promote the welfare of mankind.

4. MR. SCOTT'S ADDRESS ON THE RETENTION OF THE COMPROMIS CLAUSE IN INTERNATIONAL ARBITRATION, OCTOBER 7, 1907[1]

The American delegation is always happy to receive enlightenment and to learn something new about American constitutional law; for the objection to the compromis, that is, to the framing of the issue, is really an objection of a constitutional nature. The formulation of the compromis, to which so much importance is attached, is in our view merely a question of internal law, and we understand neither the reason nor the desire to make it a question of international law. From an international standpoint but one thing is important, namely, that the special agreement to arbitrate be concluded; but it is a matter of indifference by which branch of the government this is done. Whether it is the act of the President or of the Secretary of State, his delegate, or the work of the Senate, or whether it requires the happy coöperation of the Senate and the President, matters little, for each of these organs acts in the name of the government. The agreement to arbitrate is a governmental act, and international law applies only to

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, October 7, 1907), Vol. II, pp. 112–114.

a nation, and not to its organs, which have no personality in the law of nations.

We are told that there is a marked difference between the manner in which the agreement to arbitrate is concluded in a monarchy and the system which prevails in a republic, and much distrust is expressed regarding the latter. We cannot share this view. What does it matter whether the agreement to arbitrate is the act of an emperor or whether it is the act of a limited body or even of the whole legislature? The main thing is that it be concluded, and the manner of concluding it is indifferent, as is also the organ of the government charged with this duty by the laws and constitutions of the various countries.

It seems to us, moreover, that in attacking the special agreement to arbitrate, the existence of the treaty of arbitration is lost sight of. The agreement to arbitrate is in reality nothing without the treaty, for it is the treaty which creates an obligation to conclude it. Before concluding an agreement to arbitrate there must be a treaty of arbitration which has been ratified by the proper authority (in the United States, the Senate) after having been negotiated by the executive. It is only then that there exists a *juris vinculum*, the famous legal obligation so often mentioned by the irreconcilable and undaunted enemies of every stipulation for arbitration. When a particular case arises there exists, by virtue of a treaty, an obligation to conclude the agreement to arbitrate, but it is a general obligation; the legal obligation in such a case only comes into existence when the two nations bind themselves, or rather have bound themselves, by concluding the special agreement to arbitrate. If one of the two parties refuses to conclude this, it is clear that the other will not be obligated. How can it be asserted that one of the two nations can be bound if the other is not? The agreement to arbitrate is a special compact between two contracting parties, and as such it necessitates diplomatic negotiation, terminating in an understanding upon the form and the purport. Then only is the *juris vinculum* formed. If, for instance, a European nation is ready to conclude a special agreement to arbitrate and presents a formula, it is not bound until its partner, for instance the United States, has accepted the terms of the formula. But, on the contrary, if we suppose that, as is not at all improbable, the United States proposes the formula, there will be no obligation until the European nation, the empire of Austria-Hungary, has declared its acceptance of it. Before this

there is nothing but a tentative proposal, there is no obligation contracted regarding the special subject of the controversy, and there is only a general obligation arising from the treaty of arbitration binding alike the two signatory powers.

The opponents of arbitration reproach us with not furnishing them the *juris vinculum* necessary for their protection. More generous than even they desire, we are willing and ready to offer them not one *vinculum*, as they ask, but two, namely, one arising in the general treaty, and another resulting from the special agreement to arbitrate.

The fears of monarchical nations are therefore wholly unfounded. The special agreement to arbitrate does not arise automatically. The two parties can only be obligated concurrently by their mutual consent, and no inequality can therefore exist between them. There is in reality no actual obligation upon which a material execution can be based, until the question, regarding which the agreement to arbitrate has been concluded, is submitted to the arbitrator and an award has rendered the agreement to arbitrate executory. If the agreement is not concluded, there is no foundation for the arbitral award and no one is bound by a nonexistent judgment. Therefore when a monarchical nation sees a danger to itself in its readiness to conclude a compromis, it is frightened by an imaginary peril.

Moreover, instead of discussing the way in which the compromis should be concluded, which is irrelevant to the present purpose, it would be much more appropriate to point out the cases in which the United States has refused to conclude a special agreement to arbitrate after binding itself so to do by a general treaty of arbitration. Not a single instance of such a refusal has been cited. It is therefore to be inferred that none such exist, for otherwise, with the profound knowledge of the constitutional and diplomatic history of the United States possessed by our learned adversaries, they would not have failed to flaunt them in our face. It is common knowledge that the United States has always been willing to conclude treaties of arbitration. Recourse to arbitration is our favorite method of settling international disputes, and our marked success whenever we have submitted to arbitration furnishes the best demonstration of the fact that our country is in an excellent position to conclude the special agreements or compromis. There is surely no need at The Hague, in the very city where the United States has successfully resorted to the august tribunal here established, to dwell longer upon this point.

We do not pretend that the conclusion of the agreement to arbitrate never presents a difficulty, but we do maintain that this difficulty is technical, not legal. It may well be that a monarchical country can overcome this difficulty more easily if the agreement to arbitrate depends in its case solely upon the will of one individual. Nevertheless it cannot elude it, for even a monarch or a minister must, as well as a collective body or a parliament, weigh the *pros* and *cons* and consider whether the compromis is or is not acceptable. The treaty of arbitration does not make it obligatory to conclude any but an acceptable compromis, and any other will be rejected by an individual will as well as by the will of the collective body. It may frequently happen that the preparation of the agreement by the latter requires more time, because the complex organ moves more slowly than the individual body. The difficulty, however, is not one of an international legal nature.

In final analysis, whatever be the form of government, the question of the formulation of the compromis resolves itself, from the standpoint of international law, into a question of good faith. Every power which signs a clause of arbitration can obviously evade it, but there is no reason to suppose that the legislative body is less mindful of obligations assumed by executive organs, or that a country with a parliamentary form of government is more inclined to violate its engagements than a country whose constitutional form of government is of an autocratic character. Whenever and wherever good faith exists, the settlement of the compromis can only be a question of time. Complications of an internal character will by no means prevent a nation careful of its honor from fulfilling its engagements. On the basis of international law the nation with which it has contracted can ask nothing more. The means of action furnished by the law of nations stops at the frontiers, and the foreign state may not concern itself about the manner in which the obligation, whose fulfillment it seeks, shall be executed. It is for the cocontracting state alone to determine the means of meeting its international duties.

These truths are so self-evident that the article of the American project which has given rise to this discussion may well seem superfluous, but we have thought it advisable and necessary to dwell on this point in order that no misunderstanding shall arise regarding the delay which may sometimes be necessary in order to secure the cooperation of an internal body, for instance, in the United States, the

Senate, which is alone competent to approve treaties negotiated by the executive.

It may be, however, that it will not be necessary in every instance to submit the compromis to the Senate. This does not always happen in actual practice, and it has been observed that in the recent arbitration of the Pious Funds case and in the Venezuelan controversies the compromis was not submitted to the Senate. We have, however, felt obliged to reserve the right to submit the compromis to the Senate, and loyalty has compelled us to inform the powers of this reservation. The reservation, however, merely means that the conclusion of the compromis is subject to the provisions of the Constitution and the internal laws, which would seem to follow as a matter of course. Therefore in reserving the right in express terms we are actuated solely by a desire to avoid any possible misunderstanding, which might result in incriminations or recriminations likely to engender a suspicion of bad faith. For this reason we have thought it necessary to explain the situation frankly and fully, as it appears in the constitutional theory and practice of our country.

M. de Mercy (First Delegate of Austria-Hungary). Permit me a few words in reply to M. Scott. Our honorable colleague has only repeated the argument previously advanced in the discussion of this question in the committee of examination.

But I note that he has carefully evaded my question which was, however, simple and to the point: Why did the cabinet of Washington refuse on its own initiative to ratify the treaty of arbitration concluded with Austria-Hungary unless by reason of the difficulties it foresaw on the part of the American Senate?

Mr. Scott. The policy of the United States is not a subject for discussion in an international peace conference.

5. MR. CHOATE'S ADDRESS ON THE AUSTRO-HUNGARIAN RESOLUTION, OCTOBER 10, 1907[1]

[The Anglo-American proposition of compulsory arbitration had secured a vote of thirty-two in its favor to nine against, with three abstentions. The opponents of the measure, invoking the so-called unanimity rule common to international though foreign to national assemblies, insisted that no project

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, (October 10, 1907), Vol. II, pp. 168–170 (191–193).

should be accepted by the conference and inserted in its Final Act against the opposition of any one delegation. As Germany and Austria-Hungary opposed the Anglo-American draft convention of compulsory arbitration, it was impossible, therefore, to secure its acceptance if the unanimity rule were adhered to. M. de Merey, First Austro-Hungarian Delegate, had proposed a resolution which, while admitting that certain subjects were susceptible of compulsory arbitration without any restriction, especially questions concerning the interpretation and application of certain international conventions, nevertheless proposed that further consideration of the Anglo-American draft convention should be adjourned, and that the powers participating in the conference bind themselves to make a serious study of the entire question and notify the Netherland government at a certain specified period the subjects which they were willing to include in a treaty of obligatory arbitration. As thirty-two states represented at The Hague had agreed upon a list of subjects to be included in an arbitration treaty, this resolution, however well meant, would have resulted in the postponement of a convention. Without attempting to force the will of the majority upon the minority, Mr. Choate, nevertheless, felt that the minority should not force its will upon the majority; that the majority should conclude its convention without binding the minority, leaving to the opponents an opportunity to adhere to the convention, should they so desire. A vote was taken upon M. de Merey's proposition and it was defeated by twenty-four against, fourteen for, with six abstentions. No vote was taken upon the procedure outlined by Mr. Choate, but it is believed that the sentiment of the conference was strongly, if not overwhelmingly, in favor of maintaining the unanimity rule, even although its application in the present instance would defeat the draft convention of compulsory arbitration, for which thirty-two states had voted.]

I did not expect, Mr. President, to have had to trouble the commission again, or to occupy any moments of its time. In view, however, of the startling proposition developed by the First Delegate of Austria-Hungary, I cannot refrain from entering my earnest protest.

After having discussed for three months the subject which occupies our attention to-day, the commission has expressed its will by an overwhelming majority of thirty-one votes against five or eight, — a majority of four or more to one, — and has thereby declared emphatically in favor of obligatory arbitration. It has voted upon an entire series of articles, separately and all together, and the same majority has stood steadily by its decision. The minority has been so feeble that one could almost count its number upon the fingers of a single hand, and now it is proposed to annul everything that we have done in the last three months, and it is said by the distinguished First Delegate of

Austria that there is no alternative, — that either we must accept the rule of absolute unanimity, or the proposition which he has presented, which is absolutely contrary to the clearly manifested will of the commission, and is a fearful step backward from that which that will has so strongly expressed.

What conclusion would have to be drawn if we should accept the proposition of M. de Merey? Why, that a single member of the conference can prevent it from doing anything, and can nullify that which all the rest have succeeded in doing up to the present time. Even if it were possible to find reasons on which one could base a conclusion so cruel, it would not be for the commission to decide the question. The last word would not belong to it. Our duty as a commission is to follow out our deliberations to the end, and if our decisions have been taken by an absolute majority, we must submit them to the conference. There lies the duty with which we are charged. It is not for us, the commission, to dictate to the conference or to decide what it only can decide. Assuming, then, that there were grounds for the very destructive proposition which the First Delegate of Austria has laid down, I insist that it is not a question within the competence of the commission at all, but solely for the conference itself in plenary séance.

As to the merits of the proposition, can it possibly stand? Can five votes nullify the will of the thirty-one? That is not possible. Such a proposition cannot be sustained. By this decisive vote we have accepted the principle that we would submit to obligatory arbitration cases of a juridical order, and especially those arising upon the interpretation of treaties. We have agreed, also, that the treaty should not apply in cases where national honor or the vital interests of either party were involved, and that each power should have itself the right to determine for itself whether such was the case. We have further voted a list of cases in which arbitration should be obligatory, waiving the honor clause, and finally we have agreed to the protocol proposed by the delegation of Great Britain, which would enable subsequent subjects to be added to the list. There only remain some details for us to determine.

Now, behold, M. de Merey comes forward with his proposition, which is directly contrary to all this, which nullifies it all, which undoes all that we have been doing since we first took up the projet for consideration; and we are told that we must accept his proposition

or nothing. He would have us remit to the powers for further study a proposition on which we are all agreed. Surely we have not come here for any such trivial purpose. We have come at the behest of our governments and the general call of the nations, to establish obligatory arbitration. It has not been our purpose to labor during three months to accomplish that end, and to annul it all at last at the suggestion of five dissenting powers, and destroy at one blow the result of all our work. And will the governments succeed any better than we? Will they succeed as well as we? Have we not reached that approximate unanimity which justifies the carriage of this proposition one step further, and submitting it to the final decision of the conference? In the Third Commission that experienced diplomatist, Signor Tornielli, decided over and over again that all that was necessary to carry the proposition to the conference was that it should receive in the commission an absolute majority, that is to say, a majority of all the nations constituting the conference. At any rate, I so understood him.

It is for the conference alone to determine whether it will accept it with unanimity or with that approximate unanimity which we claim to be sufficient, and whether it shall find a place in the Final Act. It is absolutely impossible for this commission to determine any such question. Let us be faithful to our duty and hold on to that advanced ground which we have attained thus far. If there is any question to be solved, let us submit it to the conference to which it belongs. Assuredly, I pay all respect to the minority, but I have no doubt of the rights of the majority. I mean such a majority as has established this proposition, — the proposition of an obligatory agreement into which those of the nations may enter who desire to do so, and the rest may abstain until each desires to come in. You will search in vain the records of the First Conference and of this conference, and the correspondence that preceded both, for any assertion of this fatal claim of the necessity of absolute unanimity in order to secure for any act or convention a place in the Final Act of the conference. And the proof on the records is clear to the contrary. Such a rule would paralyze the will and the action of the conference at the behest of one power, even the smallest, and even though it should dissent for the mere purpose of destroying the unanimity. Seeing this, the advocates of this monstrous proposition take various shifting grounds.

It is said, on the one part, in answer to the clear proofs, that such unanimity has not been in all cases required, that the rule of absolute unanimity "generally" holds. But in saying "generally" you abandon the whole position, for who but the conference is to determine when the exceptions arise, and whether the given case comes within the "general" recognition?

On the other hand, it is said that the vote must be unanimous or "nearly so." And this again is a clear and total abandonment of the position, for who but the conference is to determine what is the meaning of "nearly so." It has no meaning, and certainly our vote of four to one on obligatory arbitration is in any sense "nearly so."

And again it is said that the rule of absolute unanimity is maintained unless the dissentients be few and do not insist upon the proposition so carried by a great majority being included in the Final Acts of the conference as a part of its work.

This suggestion also is a complete abandonment of the preposterous claim.

Clearly, this commission has no right or power whatever to meddle with the question. Its work, as I have said before, — including this proposition of ours which has been carried by such a great majority, — must go to the conference, and it is for the conference alone, where *non constat* but that it may be adopted unanimously, to determine whether it shall go into the Final Act.

They say that it was the rule of the former conference and should be the rule of this, but I deny the proposition altogether. This claim, whoever makes it, is not founded in fact. Twice the conference of 1899 acted on the opposite theory and repudiated this suggestion of absolute unanimity being necessary, and more recently — only last week — in this very conference the proposition was ignored and denied.

In the conference of 1899 the decisions of the conference on two important subjects were taken and carried into the Final Act not only against the dissent but against the earnest protest of two great powers, if Great Britain and the United States of America are entitled so to be called — I mean the propositions relative to the use of asphyxiating gas and the dumdum bullets. According to the theory which has here been developed, these decisions ought not to have become a part of the law of the world, as they did become, by the act

of the First Conference; there being the dissent of two great powers, they should have been thrown out, as it is proposed to throw out our great majority on the subject of obligatory arbitration.

But here, in this present conference, is another equally strong proof of the baseless character of the present contention. It is but a few days ago that we voted for the international court of prize. It has been accepted. It is to be embalmed in the Final Act as, in the opinion of many, the most important and valuable work of the conference; but there was one clear vote declared against it, that of Brazil. And yet nobody claimed that the rule of absolute unanimity should apply to the case. That is the established act and decision of this very conference. The First Delegate of Brazil was too magnanimous to offer any objection, based upon his negative vote, to its becoming the decision of the conference. He was generous enough to say that the accord would hold good in spite of his dissent.

Let us then, gentlemen, put to the vote of this conference the proposition of the honorable delegate of Austria-Hungary, and let us see whether those who thus far have constituted this great majority, on the one hand, wish to support their own action, or, on the other, to accept the remarkable proposition of M. de Merey, which utterly nullifies it. Let us occupy ourselves with that which is our business and leave to the conference the duty to give an answer to the question which has here been raised.

It has been said by the eminent president of the conference that my proposition would impose the will of the majority upon the minority. That, gentlemen, is a clear misapprehension. I made no such claim. The claim is, that when the vast majority of the conference desire to establish the agreement for obligatory arbitration for those who will to enter in, and those who will not to stay out, they have the right to do so, and to do it under what M. de Martens has so well described as *le drapeau de la conférence*. But the contrary proposition, which M. de Merey and others have advocated, subjects not a great majority only but the entire conference but one to the dominating and destructive will of that single one. Certainly there is neither justice, nor reason, nor common sense in a proposition that will bring about such an iniquitous result and render any decisive action on any important question absolutely impossible.

6. MR. CHOATE'S ADDRESS ON THE RESOLUTION ON COMPULSORY ARBITRATION, OCTOBER 11, 1907[1]

[The opposition of Germany to a general treaty of arbitration proved fatal to the Anglo-American project, — the result of weeks of labor, and profound discussion both in the Committee of Examination A and the First Commission. The partisans of compulsory arbitration, however, were unwilling to permit the conference to adjourn without a declaration in its favor, and on October 11, 1907, the commission unanimously adopted the following declaration in favor of compulsory arbitration, proposed by Count Tornielli, of Italy, and approved by a special committee:

The conference, actuated by the spirit of mutual agreement and concession characterizing its deliberations, has agreed upon the following declaration, which, while reserving to each of the powers represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted.

It is unanimous:

1. In admitting the principle of compulsory arbitration.
2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction.

Mr. Choate felt it inadvisable, for the reasons given in the following address, to vote for the proposed declaration, which seemed a retreat from the advanced position already taken by the commission, in accepting by an overwhelming majority the Anglo-American draft convention providing for arbitration in the concrete as well as in the abstract.]

Before the vote is taken upon the proposition which is now before the commission, I desire, on the part of the delegation of the United States of America, to make a brief statement.

The principles that have guided our action in the past in the conference, and will control it in the vote upon the present proposition, are as follows:

The immediate results of the present conference must be limited to a small part of the field which the more sanguine have hoped to see covered, but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress, and by successive steps results may be accomplished which have formerly appeared impossible.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, October 11, 1907), Vol. II, pp. 195–196 (202–203).

We have kept always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on, and we are inclined to regard the work of this Second Conference not merely with reference to the definite results to be reached here, but also with reference to the foundations to be laid for further results in future conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the delegates may reach no definite agreement.

We have carried the process of discussion upon the projet which we introduced and have advocated, and on which the commission has voted, as far as our instructions permit, which are to the effect that after reasonable discussion, if no agreement is reached, it is better to lay the subject aside or refer it to some future conference in the hope that intermediate consideration may dispose of the objections.

After three months of earnest consideration and discussion the commission reached, before the introduction of the present proposition, by a majority of four to one of the entire membership of the conference, the adoption of our projet for carrying the principle of obligatory arbitration into concrete and practical effect, by an agreement proposed to be entered into between nations who supported the projet, leaving it open for the rest to dissent or to adhere as they might afterwards be advised.

It would seem to have been the legitimate sequence of that action that the projet should be carried before the conference and find its place in its Final Act. We therefore regard the present resolution as a very decided and serious retreat from the advanced position in favor of obligatory arbitration which the commission has already reached, and one which in our judgment cannot but seriously retard and imperil the progress of the cause of arbitration in general. We therefore cannot conscientiously, without an abandonment on our part of the principles for whose practical application we have so long contended, vote for the resolution now under consideration. Not because we do not favor the principle of obligatory arbitration, for it is that for which we have been from the beginning contending, but because it is practically an abandonment by the commission of the advanced position which, by such a decisive vote, it had already reached, and I am therefore instructed by the delegation to abstain on the present vote.

7. MR. CHOATE'S TRIBUTE TO M. BOURGEOIS, OCTOBER 11, 1907[1]

[Every student of the Hague conferences must recognize the immense services which M. Bourgeois has rendered to the cause of international justice and international peace. In the First Conference, as president of the Third Commission, he was an unfailing and undaunted partisan of compulsory arbitration, and the success of the commission in drafting the Convention for the Pacific Settlement of International Disputes is largely due to his energy, his unquestioned ability, his marvelous tact, and his infinite patience, as well as his sympathy with the aims and purposes of the commission. His personal intervention and noble eloquence caused the adoption of the resolution in favor of further consideration of the limitation of armaments, and his careful handling of knotty questions in the law and custom of land warfare facilitated, if it did not actually secure, the adoption of this beneficent convention.

In the Second Conference, as president of the First Commission, to which were assigned questions of arbitration, M. Bourgeois was as indefatigable as in the First Conference, and, now as then, the living embodiment of international arbitration. The successes of the commission were largely his personal triumphs, and if he did not secure the acceptance of a general treaty of compulsory arbitration, he nevertheless forced a declaration in its favor, and the acceptance of the draft convention for the court of arbitral justice was undoubtedly due to his masterly address on August 3, 1907, and the interest and genuine concern he never failed to manifest in its behalf. The closing session of the First Commission, on October 11, 1907, was devoted to eulogies upon M. Bourgeois, both as a delegate and as presiding officer. On behalf of the American delegation Mr. Choate delivered the following address.]

Mr. President:

You are in yourself, if I may be permitted to say so, the subject which, when we come to distribute the eulogies of the commission, commands and receives that absolute unanimity which some claim to be necessary, but which it has been so difficult always to obtain in the course of our labors.

What we are now considering, our parting word to you, sir, is neither a vœu, nor a resolution, nor a recommendation, but a heartfelt declaration in which all your colleagues will be most happy to concur. All those among us who, in the exchange of compliments which you have so freely distributed, have escaped any share therein, are of one mind,

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, October 11, 1907), Vol. II, pp. 199–201 (203–204).

if we may be permitted to add to the happy words of his Excellency the President of the Conference, just addressed to you, and we cannot fail to recognize with profound admiration the absolute impartiality, in all other respects, with which you have from the beginning guided our proceedings.

It is now four months ago that we assembled here. We have discussed, we may say without boasting, most difficult and delicate subjects all the time, which involved not only serious thought but sometimes our deepest feelings, and what is truly remarkable is, that in all that time not a single day has witnessed, so far as I can remember, the least bad temper. Certainly there have been some lively moments. The earth has occasionally trembled beneath our feet. Etna has rumbled and Vesuvius occasionally has given a flash, but never once has there been a volcanic eruption. At every moment the commission has been mistress of its own passions. This truly is a remarkable circumstance, and no assembly of such importance that I have ever heard of has met and continued together so long a time and given such a marvelous example of order and harmony.

All this I attribute, Mr. President, to the powerful influence which you have never ceased to exert over those who are subject to your sway. It is your genial presence and the gladness and light that always radiate from your person that are accountable for this happy result. No other man among us could possibly have kept us more closely together or brought us more nearly to the desired goal of absolute unanimity.

Certain newspapers which I have read have given the impression that our labors have not been considerable or important, but, on the contrary, I am of opinion that we have a right to be proud of what we have done, and that everything that high endeavor and conciliatory spirit and untiring industry could bring about has been actually accomplished.

To begin with, the international court of appeal in prize constitutes a new departure of very high importance. It will substitute for the selfish edicts of national courts, rendered under the excitement of war in which their states were engaged, the supervising judgment of a serene and impartial appellate tribunal, which will aim at nothing short of absolute international justice and right. I have little doubt that it will be accepted and approved by the governments, and that it will not fail to advance the cause of justice and of peace. Under its

administration the common welfare of the nations will take the place of self-interest in the adjudication of national disputes.

We have also the earnest conviction that the day is not far distant when the *cour de justice arbitrale* will be established in reality on lasting foundations. It is true that in forming the constitution of such a court and recommending to the nations its establishment thereon, when they shall have arranged among themselves as to the number and distribution of judges, we have not completed the work, but we have laid the corner stone upon which this new and great tribunal of arbitration will be erected, just as we aided our distinguished president in laying the corner stone of the new *Palais de la Paix* within whose walls the sittings of these new tribunals will be permanently held. They say that we cannot guess how long a time will elapse before this final result of our labors shall be realized, but what we could not finish in four months, the nations that we represent — in whose lives four years are as nothing — will, before the meeting of the next conference, I am sure, complete.

We have done much besides. We have, with actual unanimity, established the rule that force shall not be resorted to for the collection of contractual debts against a nation until arbitration has been had or refused, by adopting a resolution which will carry the name of General Porter into all quarters of the earth where nations borrow money, and down to distant generations as long as they shall fail to pay their debts, which perhaps means as long as grass grows or water runs.

We have also made suitable arrangements for better preparation for the work of the next conference, for its being regulated from the outset by the joint action of the powers, and for its more suitable organization and procedure, so that its labors may be rendered more easy and more effective than ours have been.

There are many other steps forward in the path of progress that we have taken, and although it is true that we have failed now to reach complete unanimity on the subject of obligatory arbitration, we who have advocated it do not despair, and have never been better assured than at this moment that that great cause will triumph at last, and that by the common consent of the nations arbitration will be substituted for war, — a result which will at last obtain universal approval.

During these four months, Mr. President, we have lived happily under your benign dominion. We have worked hard and have earned the bread of the conference by the sweat of our brows, and there have been moments of trial and suffering, but in separating we look back with satisfaction upon our labors, thanks greatly to your beneficent and harmonizing spirit.

IV. MR. CHOATE'S REMARKS ON THE INTERNATIONAL COURT OF PRIZE, JULY 11, 1907[1]

[The outbreak of war subjects enemy property on the high seas to capture and confiscation, but the effects of war are not confined to the actual belligerents. Many and heavy duties are imposed upon neutrals, and neutral industry and commerce are subjected to many and heavy risks. Trade in contraband is practically forbidden or subjected to capture and condemnation, and the neutral vessel is debarred from blockaded ports. The courts of a belligerent, technically called prize courts, pass upon the validity of capture, and while the decisions of such courts may be acceptable to belligerents, it has always been a source of annoyance to and of complaints by neutrals that the rightfulness or wrongfulness of the capture and condemnation of neutral property should be determined by a belligerent court in which neutrals are not represented. The presumption is always in favor of the captor, and the neutral finds himself in no figurative sense ground between the upper and the nether millstone. For the past century and a half an international court of prize has been the subject of discussion, as appears from the following brief statement from Dr. Oppenheim's excellent treatise on international law.

The first proposal of this kind was made in 1759 by Hübner,[2] who suggested a prize court composed of judges nominated by the belligerent, and of consuls or councilors nominated by the home state of the captured neutral merchantmen. A somewhat similar proposal was made by Tetens[3] in 1805. Other proposals followed until the Institute of International Law took up the matter in 1875, appointing on the proposal of Professor Westlake, at its meeting at The Hague, a commission for the purpose of drafting a *Projet d'organisation d'un tribunal international des prises maritimes*. In the course of time there were in the main two proposals before the institute, Westlake's and Bulmerincq's. Westlake proposed[4] a court of appeal to be instituted in each case of war, which should consist of three judges, — one to be nominated by the belligerent concerned, another by the home state of the neutral prizes concerned, and the third by a neutral power not interested in the case. According to Westlake's proposal there would therefore have to be instituted in every war as many courts of appeal as neutrals are concerned. Bulmerincq proposed[5] two courts to

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 2d Subcommission, July 11, 1907), Vol. II, pp. 801–804 (810–813). For the questionnaire upon which Mr. Choate's remarks were based, see Appendix, p. 193.

[2] *De la saisie des bâtiments neutres* (1759), Vol. II, p. 21.

[3] *Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer, avec les principes du droit de guerre en général* (1805), p. 62.

[4] See *Annuaire*, Vol. II (1878), p. 114.

[5] See *R. I.*, Vol. XI (1879), pp. 191–194.

be instituted in each war for all prize cases, the one to act as prize court of the first instance, the other to act as prize court of appeal, each court to consist of three judges, — one judge to be appointed by either belligerent, the third judge to be appointed in common by all neutral maritime powers. Finally the Institute agreed, at its meeting at Heidelberg in 1887, upon the following proposal, which is embodied in §§ 100–109 of the *Règlement international des prises maritimes*:[1] At the beginning of a war either belligerent institutes a court of appeal consisting of five judges, the president and one of the other judges to be appointed by the belligerent, the three remaining to be nominated by three neutral powers, this court to be competent for all prize cases.[2]

At the Second Hague Conference Germany and Great Britain proposed the creation of such a court. According to the German plan the court was to consist of five judges, two of whom should be admirals or high naval officers, and the balance chosen from members of the permanent panel of the Hague Court. The machinery for the court would thus be designated, but the court itself would need to be constituted for each war. The British project, on the other hand, provided for a permanent court composed of representatives from the leading maritime nations. The German project allowed an appeal from the municipal court of first instance, whereas the British proposal required a final decision of the international court. The differences between the German and the British proposition were great and fundamental, and it appeared at one time improbable that an acceptable compromise could be reached. The timely intervention of Mr. Choate on July 11, 1907, harmonized these seemingly irreconcilable differences, and the first international judiciary was constituted along the lines suggested by Mr. Choate in the following address. The court as ultimately constituted is to be permanent in character, although only called into action as a result of a maritime war; it is to be composed of fifteen judges, familiar with the principles of international maritime law, of whom one shall be chosen from each of the following eight countries: Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, and the balance by a system of rotation, depending upon the importance or supposed maritime interests of the signatory powers. Should a belligerent be unrepresented in the court, provision is made that its judge be admitted during the trial of the case to which it is a party, and "the belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor but with no voice in the decision" (Prize Court Convention, Article 18).[3]]

Mr. President:

It may be timely for me at this moment, with your approval, to express the views and position of the delegation which I represent on several of the questions which have been discussed.

[1] *Annuaire*, Vol. IX (1887), p. 139.

[2] Oppenheim's *International Law*, Vol. II, pp. 478–480.

[3] For the text of the convention as voted by the conference, see Appendix, pp. 194–204.

Representing as we do a widely extended maritime nation, and a nation which hopes and confidently expects always in the future to be a neutral nation, we deem the establishment of an international court of prize by this conference to be a matter of supreme importance, and while we have very distinct and generally very positive views upon each of the questions under discussion, we consider the establishment of a court far more important than to impose upon it our own local or national views either as to its constitution or its powers. It will certainly be a tremendous triumph of justice and peace if this conference, before it dissolves, shall succeed in creating such an arbiter between the nations.

Therefore I think that the best possible service I can now render on the part of our delegation and of the entire subcommittee is not to urge strongly our strong and fixed opinion, but to suggest, if possible, some middle way by which the opposing views entertained by different nations may be harmonized and reconciled so as to create the court. Better any court, however constituted, and with whatever powers, than no international court at all. One great international court will be a marked advance in the progress of the world's peace and will go far to satisfy the universal demand which presses upon us so strongly from every section of the world.

You will not then regard me as waiving or receding from our national views upon any question if I proceed now, with a view to that harmony without which it is impossible to create any court, to consider very briefly some of the particular questions which have agitated the committee, and upon which the views of the able representatives of many powers have been expressed in such highly intelligent and useful ways.

Take for instance the fourth question, — whether the appeal to the international court of prize shall be directly from the court of first instance or from the court of last resort. If we were now pressed to a vote on that particular question, we should have to side very strongly with the position taken by the British delegation, and it would be found that our tenacity upon that would be as firm, and, if I might use a stronger word, as obstinate, as that of our British colleagues; because our people, by history and tradition, are so much in love with the Supreme Court of the United States, which they so believe to be the tribunal in which the gladsome light of jurisprudence rises

and sets, and to be a court which commands the almost equal respect and admiration of other nations, that we could hardly go home in safety with the report that we had unnecessarily consented to any plan which would leave that court out of the administration of prize law. I think we may state, without contradiction, that in the last hundred years it has taken a very considerable part in the making of the prize law which now constitutes a portion of the established international law of the world, and that its decisions in prize are in substantial conformity with the decisions in all the maritime jurisdictions which have dealt with the subject, so that we are as firmly wedded to it as an indispensable factor in the future adjudication of prize law as our colleagues of the British delegation are to their court of last resort. It was to the decisions of the great Lord Stowell that our great jurists Marshall and Story looked for light and leading on such questions, and it is not too much to claim that together they settled the law for the world.

And so in respect to the second question, — as to whether the appeal should be taken by the individual suitor whose property has been condemned in a prize court, or by the nation to which he belongs. We entertain a pretty clear view upon that point, that if the appeal is to go from the court of last resort it may well be taken by the individual suitor and not by his nation, but possibly under some general rules of limitation, to be prescribed by his nation, so that the nation may have some power to prevent an individual appeal, perhaps on some very trifling case, from embarrassing or calling into conflict its established policy.

But strong as our views are on these two questions, I deem it our duty, if possible, to find some middle way by which they may be reconciled or at least adjusted and coordinated with those of other nations, who quite as firmly contend that the appeal should be from the court of first instance and by the nation to which the subject or citizen whose property has been condemned in prize shall belong. We should like therefore to suggest the possibility of the introduction of a feature which should accomplish the result in both these respects desired by both the contending parties, and that is, that the appeal should be taken from such court and by such party, whether individual or nation, as the laws of the nations to which the respective parties belong and to whose entire jurisdiction they are subject, shall by reciprocal legislation prescribe. Certainly a suitor against whom the case had gone

in the court of first instance would cheerfully submit to whatever the law of his country prescribed in that respect, whether he should himself appeal or submit it to his nation to do so or not, as it might decide, and whether he should appeal directly to the international court of appeal in prize or seek the judgment of the higher court or courts of the nation condemning him.

As to our firm conviction in favor of the appeals being taken only from our own Supreme Court, it might well be that Congress, with a view to adjustment of the question, might reciprocally consent to an appeal by aliens from the courts of first instance, and, in view of the enormous benefits to be derived by the whole world from the successful establishment of an international prize court, would be sustained in so doing by the popular judgment.

In respect to the third question, the one point which we should insist upon in any choice that might be made between the two alternatives proposed by the question, is one which I think will be agreed upon by all the nations. Necessarily, whichever alternative is adopted, neutrals, whether as individuals or governments, will have the greatest interest in the proceedings and decisions of the court, but in no event must we allow to a national an appeal against the decision of the highest court, or of any court of his own nation, condemning him for a violation of its own law or of a blockade which it has established. Experience shows that when a nation establishes a blockade its own citizens are apt to be the most flagrant in their attempts to violate it, and it would never do to allow to the subject of any nation an appeal to any other tribunal from the decision of the courts of his own country condemning him for a violation of its own laws, as for instance its Foreign Enlistment Act, or for an attempt to violate a blockade established by it.

Then as to question five, — whether the international jurisdiction of the prize court shall have a permanent character or shall be constituted for the occasion of each war. The delegation of the United States of America is most earnestly in favor of a permanent court lasting not for each war, which might make it almost an annual affair, because wars are so numerous, but a court which should last for all time, and should gradually settle all international differences in prize law and establish an international jurisprudence which should cover all cases and satisfy and command the confidence of all nations. But

here, too, is there not a middle ground which might afford a resting place for all conflicting views? With much diffidence we would suggest that the court might, as to its jurisdiction, be permanent in its character, but with a special feature or element adaptable to each war as it might arise.

Suppose the court to be composed permanently of three or five judges and thereby maintain its continuity through all wars and under all circumstances, with a right, in the case of war arising, to each belligerent to add a member to the court. Will not that be practicable, and ought it not to satisfy the reasonable demands of each party to any war that might unfortunately arise? I offer this, not as a final proposition, but as a possibility for ultimate consideration in the effort to solve the difficulties that confront us.

And lastly, as to the equally important question, What element shall enter into the composition of the court, whether it be permanent or temporary? It is most earnestly contended on the part of several nations that that court should consist only of learned jurists, and that no other element should enter into its composition, and we are one of the nations who are strongly convinced of that view. A court is a court, and a jurist is a jurist, and in our judgment the introduction of any other element than jurists tends to detract to that extent from the true judicial character which the tribunal should possess. On the other hand, it is claimed, with equal confidence and earnestness, that it should consist in part, at least, of admirals who are not jurists and do not claim to be, but who are justly claimed to have special qualities and skill to contribute to the solution of maritime and prize questions. Now while we cannot consent to accept that method of constituting a court, is there not an approach to it which may satisfy, approximately at least, the claims of both contending parties? I think myself the importance of the claims of those who contend for the introduction of admirals or naval experts as a component part of the court are greatly overestimated. If, as Monsieur Kriege of the German delegation concedes, the two admirals appointed by the contending belligerents should neutralize each other, it might be a useful and interesting contribution by belligerents to neutrality, but would it really do any good? If each admiral, sitting at either end of the court, is to neutralize or kill the other off, why have them at all? Will it not simply end in their mutual slaughter without adding any new life, strength, or vigor to the court?

Why put them up upon such an exalted bench for the mere purpose of shooting each other down?

And if, as M. de Martens of the Russian delegation has insisted, it is necessary to have the presence in the tribunal of experienced admirals or learned naval experts, without whose advice and concurrence the decisions of the court cannot be reached, is it absolutely necessary to give them seats upon the exalted bench itself, and will not chairs placed a little lower satisfy all the necessities and reasonable demands of the occasion? May they not be present, not absolutely as judges to give the decision, but as advisers without whose full advice no decision can be rendered? No one would claim that they should be present as expert witnesses to be examined and cross-examined; but they would be in the highest degree useful as skilled experts with the same authority as the judges to examine and cross-examine the witnesses and to collate and arrange the proofs. Would it not also be entirely practicable to admit them to the consultations of the secret chamber of the judges and to provide that no decision should be rendered until they had been admitted to such consultations and fully maintained their views?

And so, Mr. President, on the subsidiary question contained in question six, — whether in a given litigation in prize judges of the nationality of the parties concerned shall be admitted to sit, — our delegation has very positive views that they should not be so admitted, that the admission of nationals to a conflict should not be and could not be permitted, because they could not be impartial judges in a litigation to which they were really parties in interest. But it must be admitted that in many important arbitrations to which our nation has heretofore been a party it has not only consented, but sometimes insisted, that some member of the tribunal should be of our own nationality, and even appointed by our government, so that this is also a question upon which contending views may well, and perhaps easily, be harmonized.

Now, Mr. President, I have thrown out these views, or I might rather say suggestions, crude as they are, to lead up to a proposition which, in the interests of harmony, I think may well be made at this moment. You observe that I have not attempted to enforce any of our opinions, however firmly we may hold them, for I think that it is impossible, in a subcommittee consisting of a hundred or more

members, to solve any such questions. The more we discuss them, the more our divergences of opinion are likely to be increased, and there is danger that a protracted and persistent discussion in a committee of such large dimensions may result in putting us wider apart instead of bringing us nearer together. There is a certain pride of opinion which asserts itself in public discussion before such an audience and leads each of us to be more unwilling to yield anything of our contentions in such a presence. But convinced as I am that there are no questions here involved that are not capable of solution if each of us is inspired, as I hope we all are, by a desire to make mutual concessions for the sake of the immense benefit to be gained by all by the constitution of an international court of prize, though we may not really come to accept each other's views, we may give and take until a harmonious solution is reached. I therefore suggest, with all deference to the entire subcommittee, that the only way out of our present difficulty is by remitting all the questions, after the valuable discussions that have now been had, to a committee of five or seven members to be appointed by the chair to consider and report upon a plan for the court, and this whether they are or are not able to answer with one voice all the questions which have been framed by the committee of three already appointed, and which the entire subcommission, in plenary session, has found it so difficult to answer.

I have not referred to those very important questions, numbers seven and eight, because we have not yet reached those in the orderly course of discussion, and because I assume that if the suggestion of our delegation is followed, those two questions, on which important reservations will doubtless be made before the subcommission, will be remitted with the rest for the consideration of the special committee to be appointed.

V. THE PROPOSED COURT OF ARBITRAL JUSTICE

[The First Conference declared arbitration to be at once the most equitable and the most efficacious means of settling a difficulty which diplomacy had failed to adjust, and provided a code of arbitral procedure which has been found adequate to the needs of litigants in the five cases tried before the Hague Tribunal. The recognition of arbitration and the adoption of a code of procedure necessitated, it would seem, a court for the trial of the case; otherwise the declaration in its favor and the code of procedure would fail of their purpose. While it cannot be said that the First Conference established a court of arbitration, it did create the machinery from which a temporary tribunal could be selected. For example, it provided "that each signatory power shall select four persons, at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators" (Article 23). From this panel the signatory powers agreed to choose the members of the temporary tribunal; and in case of failure to agree upon the personnel, Article 24 provided that "each party appoints two arbitrators, and these together choose an umpire." An international bureau, appointed by and under the direction of the administrative council, consisting of the diplomatic agents of the signatory powers accredited to The Hague, is the record office for the court (Article 22).

From this brief statement it is evident that there is no permanent court; at most there is a permanent panel, from which a temporary tribunal can be constituted for each case as it arises. The American delegation to the Second Conference sought to make arbitration a judicial remedy by establishing a court truly permanent, composed of judges acting under a sense of judicial responsibility, representing the various languages and judicial systems of the world, and ready at all times to receive and to decide a case pursuant to the principles of law and justice. Accepting the declaration of the First Conference that arbitration is at once the most equitable and the most efficacious method of settling controversies, the American delegation endeavored by the establishment of a court to make it judicial. Therefore, on August 1, 1907, Mr. Choate, pursuant to direct instructions from Secretary Root, introduced the American project for a truly permanent court, which, it was hoped, would not only render arbitration judicial but, by its decisions, would contribute to the development of arbitral jurisprudence.[1] At the same session Mr. Scott developed at length the elements which, in the view of the American delegation, should enter into the constitution of the court. On August 3, 1907,

[1] For the text of the original American proposal, see Appendix, p. 205.

largely due to the timely intervention and generous sympathy of M. Bourgeois, the American project was referred to the Committee of Examination for the preparation of a draft convention, which, after much debate in Committee of Examination B and in the First Commission, was adopted by the conference on October 16, 1907, and the establishment of the court recommended, through diplomatic channels, when the powers should agree upon the appointment of the judges and the constitution of the court.

The principle of a permanent court proved acceptable to the conference, but it was found impossible, within the short time at its disposal, to find or devise a method of composition satisfactory to all of the states represented. The larger nations insisted upon permanent representation in the court of arbitral justice as in the international court of prize. The smaller nations insisted upon an equality of representation, which, if carried out to the letter, would mean a court of forty-four members. On September 5, 1907, Mr. Choate delivered an address in which he proposed various methods for constituting the court, any one of which would assuredly have created an international institution worthy of the conference. None, however, proved acceptable, and on September 18, 1907, Mr. Choate delivered an address in which he proposed a system of election based upon the absolute equality of nations, which method was found to be as unacceptable to the smaller states, which feared that the judges of the larger states would be elected, as to the larger states, which feared combination among the smaller states, resulting in the exclusion of the larger.

1. MR. CHOATE'S ADDRESS ON THE AMERICAN PROJECT FOR A PERMANENT COURT OF ARBITRAL JUSTICE AUGUST 1, 1907[1]

Mr. President:

In commending to the favorable consideration of the subcommission the scheme which our delegation has embodied in a proposition relative to the Permanent Court of Arbitration, I cannot better begin what I have to say than to quote a sentence from the letter of President Roosevelt to Mr. Carnegie on the fifth of April last, which was read at the Peace Congress held at New York. He says:

> I hope to see adopted a general arbitration treaty among the nations, and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries so as to make it increasingly probable that in each case that may come before them they will decide between the nations, great or small, exactly as a judge within our own

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 1st Subcommission, August 1, 1907), Vol. II, pp. 309–314 (327–330).

limits decides between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at The Hague, but it seems to me that this of a general arbitration treaty is perhaps the most important.

And our instructions are to secure, if possible, a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented, and that the court shall be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointments to it, and that the whole world will have absolute confidence in its judgments.

There can be no doubt, Mr. President, of the supreme importance of the step in advance which we ask the conference to take in developing and building up, out of the Permanent Court of Arbitration created by the conference of 1899, a tribunal which shall conform to these requirements and satisfy a universal demand which presses upon us from all quarters of the world for the establishment of such a tribunal. The general cause of arbitration as a substitute for wars in the settlement of international differences has advanced by leaps and bounds since the close of the First Peace Conference, and nothing more strongly demonstrates the utility of the great work accomplished by that conference than the general resort of the nations to agreements for arbitration among themselves as the sure means of securing justice and peace and avoiding a resort to the terrible test of war.

Our plan, if adopted, will preserve and perpetuate the excellent work of the First Conference and carry it to its logical conclusion. Following the noble initiative of Lord Pauncefote, that great and wise statesman who was the First Delegate of Great Britain, whose persuasive words upon the subject will never be forgotten, the First Conference, after establishing for all time the principles of arbitration, created a tribunal to which all nations, whether signatory powers or not, might voluntarily resort for the determination of all arbitrations upon which they might agree. But one cannot read the debates which ushered in the taking of that great step by the First Conference without realizing that it was undertaken by that body as a new experiment and not without apprehension, but with an earnest hope that it would serve as a basis, at least, of further advanced work in the same direction by a future conference. The project was as simple as the purpose of it was grand, but, as Mr. Asser has well said in his eloquent

speech, it created a court in name only by furnishing a list of jurists and other men of skill in international law from whom the parties to each litigation might select judges to determine the case, who should sit at The Hague according to machinery provided for the purpose, and proceed by certain prescribed methods, if no others were agreed upon by the parties.

We have with us, I believe, as members of the present conference, some seventeen members of the former conference who participated in that great work, and about an equal number of the judges whose names were placed upon the list by the various nations in conformity with the power given them by the convention of 1899. And our present effort is by no means to belittle or detract from their work, but to build upon it a still nobler and more commanding structure, and it is their support that we would seek especially to enlist in this new undertaking.

We do not err, Mr. President, in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, and to draw to the Hague Tribunal for decision any great part of the arbitrations that have been agreed upon; and that in the eight years of its existence only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of the court at least two thirds have not, as yet, been called upon for any service. It is not easy, or perhaps desirable, at this stage of the discussion to analyze all the causes of the failure of a general or frequent resort by the nations to the Hague Tribunal, but a few of them are so obvious that they may be properly suggested. Certainly it was for no lack of adequate and competent and distinguished judges, for the services they have performed in the four cases which they have considered, have been of the highest character, and it is out of those very judges that we propose to constitute our new proposed court.

I am inclined to think that one of the causes which has prevented a more frequent resort of nations to the Hague Tribunal, especially in cases of ordinary or minor importance, has been the expensiveness of a case brought there; and it should be one element of reform that the expense of the court itself, including the salaries of the judges, shall be borne at the common expense of all the signatory powers, so as

to furnish to the suitors a court at least free of expense to them, as is the case with suitors of all nations in their national courts.

The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact it has thus far been a court only in name, — a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good as far as it has been permitted to work at all, but our effort should be to try and make a tribunal which shall be the medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

Let us then seek to develop out of it a permanent court, which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations. By such a step in advance we shall justify the confidence which has been placed in us and shall make the work of this Second Conference worthy of comparison with that of the conference of 1899.

We have not, Mr. President, in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the president to consider them.

The plan proposed by us, Mr. President, does not in the least depart from the voluntary character of the court already established. No nation can be compelled or constrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods and to avoid the terrible consequences and chances of war.

In the first article of our projet we suggest that such a permanent court of arbitration ought to be constituted; and that is the great question of principle to be first decided. And to that end we submit that it should be composed of not more than seventeen judges, of whom nine should be a quorum, — men who have enjoyed the highest moral consideration and a recognized competence in questions of international law; that they shall be designated and elected by the nations, but in a way prescribed by this entire conference, so that all the nations, great and small, shall have a voice in designating the manner of their choice; and that they shall be chosen from so many different countries as fairly to represent all the different systems of existing law and procedure, all the principal languages of the world, all the great human interests, and a widely distributed geographical character; that they shall be named for a certain number of years, to be decided by the conference, and shall hold their offices until their respective successors, to be chosen as the conference shall prescribe, shall have accepted and qualified.

Our second article, Mr. President, provides that our Permanent Court shall sit annually at The Hague upon a specified date, the same date in each year, to be fixed by the conference, and that they shall remain in session as long as the necessity of the business that shall come before them may require; that they shall appoint their own officers and, except as this or the preceding conference prescribes, shall regulate their own procedure; that every decision of the court shall be by a majority of voices, and that nine members shall constitute a quorum, although this number is subject to the decision of the conference.

We desire that the judges shall be of equal rank, shall enjoy diplomatic immunity, and shall receive a salary, to be paid out of the common purse of the nations, sufficient to justify them in devoting to the consideration of the business of the court all the time that shall be necessary.

By the third article we express our preference that in no case, unless the parties otherwise agree, shall any judge of the court take part in the consideration or decision of any matter coming before the court to which his own nation shall be a party. In other words, Mr. President, we would have it in all respects strictly a court of justice, and not partake in the least of the nature of a joint commission.

By the fourth article we would make the jurisdiction of this Permanent Court large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign states, which they had not been able to settle by diplomatic methods, and which shall be submitted to it by an agreement of the parties; that it shall have not only original jurisdiction, but that room shall be given to it to entertain appeals, if it should be thought advisable, from other tribunals, and to determine the relative rights, duties, or obligations arising out of the sentences or decrees of commissions of inquiry or specially constituted tribunals of arbitration.

Our fifth article provides that the judges of the court shall be competent to act as judges upon commissions of inquiry or special arbitration tribunals, but in that case, of course, not to sit in review of their own decisions, and that the court shall have power to entertain and dispose of any international controversy that shall be submitted to it by the powers.

And finally, by Article 6, that its membership shall be made up as far as possible out of the membership of the existing court, from those judges who have been or shall be named by the parties now constituting the present conference, in conformity with the rules which this conference shall finally prescribe.

Mr. President, with all the earnestness of which we are capable, and with a solemn sense of the obligations and responsibilities resting upon us as members of this conference, which in a certain sense holds in its hand the fate and fortunes of the nations, we commend the scheme which we have thus proposed to the careful consideration of our sister nations. We cherish no pride of opinion as to any point or feature that we have suggested in regard to the constitution and powers of the court. We are ready to yield any or all of them for the sake of harmony, but we do insist that this great gathering of the representatives of all the nations will be false to its trust, and will deserve that the seal of condemnation shall be set upon its work, if it does not strain every nerve to bring about the establishment of some such great and permanent tribunal which shall, by its supreme authority, compel the attention and deference of the nations that we represent, and bring to final adjudication before it differences of an international character that shall arise between them, and whose decisions shall be appealed to as time progresses for the determination of all questions of international law.

Let us then, Mr. President, make a supreme effort to attain not harmony only, but complete unanimity in the accomplishment of this great measure, which will contribute more than anything else we can do to establish justice and peace on everlasting foundations.

The commission will distinctly understand that our proposed court, if established, will not destroy but will only supplement the existing court, established by the conference of 1899, and that any nations who desire it may still resort to the method of selecting arbitrators there provided.

Gentlemen, it is now six weeks since we first assembled. There is certainly no time to lose. We have done much to regulate war, but very little to prevent it. Let us unite on this great pacific measure and satisfy the world that this Second Conference really intends that hereafter peace and not war shall be the normal condition of civilized nations.

2. MR. SCOTT'S ADDRESS ON THE ELEMENTS ENTERING INTO THE COMPOSITION OF AN INTERNATIONAL COURT OF ARBITRAL JUSTICE, AUGUST 1. 1907[1]

In opening the National Arbitration and Peace Congress in the city of New York, on the fifteenth day of April, 1907, the Hon. Elihu Root, Secretary of State for the United States of America, expressed, in a few apt paragraphs, the causes which have worked against general arbitration and the reasons which have prevented a more frequent recourse to the Permanent Tribunal of Arbitration at The Hague. I therefore beg to quote the following passages from his address:

It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial tribunal; it is rather an apprehension that the tribunal selected will not be impartial. In a dispatch to Sir Julian Pauncefote, dated March 5, 1896, Lord Salisbury stated the difficulty. He said that

"If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their sympathies, men wish for the victory of one side or another. Such conflicting sympathies interfered most formidably with the choice of an impartial arbitrator. It would be too invidious to specify the various forms of bias by which, in any important controversy between

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 1st Subcommission, August 1, 1907), Vol. II, pp. 313–321.

two great powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment each great power could point to nations whose admission to any jury, by whom its interests were to be tried, it would be bound to challenge; and in a litigation between two great powers the rival challenges would pretty well exhaust the catalogue of the nations from which competent and suitable arbiters could be drawn. It would be easy, but scarcely decorous, to illustrate this statement by examples. They will occur to any one's mind who attempts to construct a panel of nations capable of providing competent arbitrators, and will consider how many of them would command equal confidence from any two litigating powers.

"This is the difficulty which stands in the way of unrestricted arbitration. By whatever plan the tribunal is selected, the end of it must be that issues in which the litigant states are most deeply interested will be decided by the will of one man, and that man a foreigner. He has no jury to find his facts; he has no court of appeal to correct his law; and he is sure to be credited, justly or not, with a leaning to one litigant or the other."

The feeling which Lord Salisbury so well expressed is, I think, the great stumbling-block in the way of arbitration. The essential fact which supports that feeling is that arbitration too often acts diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments, and the sense of honorable obligation which has grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honorable obligation which characterizes the judicial department of civilized nations. Instead of the sense of responsibility for impartial judgment, which weighs upon the judicial officers of every civilized country, and which is enforced by the honor and self-respect of every upright judge, an international arbitration is often regarded as an occasion for diplomatic adjustment. Granting that the diplomats who are engaged in an arbitration have the purest motives; that they act in accordance with the policy they deem to be best for the nations concerned in the controversy; assuming that they thrust aside entirely in their consideration any interests which their own countries may have in the controversy or in securing the favor or averting the displeasure of the parties before them, nevertheless it remains that in such an arbitration the litigant nations find that questions of policy, and not simple questions of fact and law, are submitted to alien determination, and an appreciable part of that sovereignty which it is the function of every nation to exercise for itself in determining its own policy is transferred to the arbitrators. . . .

What we need for the further development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility. We need for arbitrators not distinguished public men concerned in all the international questions of the day, but judges who will be interested only in the question appearing upon the record before them. Plainly this end is to be attained by the establishment of a court of permanent judges, who will have no other occupation and no other interest but

the exercise of the judicial faculty under the sanction of that high sense of responsibility which has made the courts of justice in the civilized nations of the world the exponents of all that is best and noblest in modern civilization.

It is a familiar doctrine that the shoemaker should stick to his last and that he should not go beyond it. It should be an equally familiar doctrine that lawyers and jurists of reputation are preëminently qualified to deal with questions relating to the organization and development of a court of justice. The opinion is not expressed, either directly or indirectly, that the layman should not have views upon this subject, and express them, but it would seem to be unarguable that the advice of the bench and the bar should be determinative in all questions relating to courts of justice.

The plan which the American delegation has had the honor to lay before the conference is the result of direct instructions from the Secretary of State, who is not only a lawyer of distinction but a leader of the bar. The explanation of the general principles relating to the establishment of a permanent court comes from our distinguished First Delegate, who led the American bar as long as he chose to remain in active practice.

It would seem, therefore, that a project outlined by one practitioner of distinction, and commended to your careful consideration by another no less distinguished member of the profession, must possess qualities which commend it to the consideration of the profession at large.

The American people, rightly or wrongly, are regarded as preeminently practical, and a project which commands their unanimous support, because it expresses their innermost desire, must be practical in the broadest sense of the term. But we believe that the project for the establishment of a permanent court will not merely commend itself to practitioners, but that it is susceptible of theoretical defense.

Before entering upon the detailed exposition of the project and presenting the fundamental principles underlying the proposed permanent court, I desire to call attention to the present court and to show its strength and its weakness, in order that it may appear that our project develops the strength on the one hand and eliminates the weakness on the other.

The strength of the work of 1899 lies in the *idea* of a court for the settlement of international differences; its weakness consists in the fact that the machinery provided is inadequate for its realization.

I quote the following articles from the convention of 1899:

ARTICLE 15. International arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law.

ARTICLE 16. In questions of a legal nature, especially in the interpretation or application of international conventions, arbitration is recognized by the signatory powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

ARTICLE 20. With the object of facilitating immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory powers undertake to organize a permanent court of arbitration, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention.

The intent of the framers of this remarkable convention is evident: arbitration is to take up the task of settlement where diplomacy has failed, and reason thus thrusts itself between negotiation and the sword.

The signatory powers agreed to organize a permanent court of arbitration, and this court, so organized, was to be accessible at all times. It is common knowledge that no permanent court exists because no permanent court ever was established under the convention, and it necessarily follows that if a permanent court does not exist, it is not accessible at all times, or indeed at any time. The most that can be said is that the signatory powers furnished a list of judges from which, as occasion required, a temporary tribunal of arbitration might be composed.

It would further appear that the judges so appointed by the signatory powers were not necessarily judges in the legal sense of the word, but might be jurists, negotiators, diplomatists, or politicians specially detailed. In a word, the Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges.

A careful examination of the sections previously quoted shows beyond peradventure that the framers contemplated the establishment of a court of justice to which differences of an international nature might be submitted for judicial consideration and decision.

Article 15 speaks of "judges of their choice," and indicates in no uncertain measure that the decision is to be based upon "respect of

law." Article 16 lays stress upon questions of a judicial nature and declares that arbitration is recognized as the most efficacious and the most equitable method of settling conflicts of this nature.

It requires neither argument nor intellectual acumen to discover the intent of the convention in the wording and in the spirit of the act itself.

To decide as a judge, and according to law, it is evident that a court should be constituted, and it is also evident that the court should sit as a judicial, not as a diplomatic or political, tribunal. Questions of special national interest should be excluded because the intent clearly is to decide a controversy not by national law but by international law. A court is not a branch of the foreign office, nor is it a chancellery. Questions of a political nature should likewise be excluded, for a court is neither a deliberative nor a legislative assembly. It neither makes laws nor determines a policy. Its supreme function is to interpret and to apply the law to a concrete case.

The court, therefore, is a judicial body composed of judges whose duty it is to examine the case presented, to weigh evidence, and thus establish the facts involved, and to the facts thus found to apply a principle of law, thus forming the judgment. It follows, then, that only questions capable of judicial treatment should be submitted, and that the duty of the judge should be limited to the formation of judgments. The desideratum is that a law and its interpretation should be certain, and certainty of judgment is possible only when strictly judicial questions are presented to the court. Upon a given state of facts you may predicate a judgment. If special interests be introduced, if political questions be involved, the judgment of a court must be as involved and confused as the special interests and political questions.

In stating boldly that the court should not deal with questions of special national interest, nor with questions of national policy, and in expressing the opinion that judges should decide according to the law as judges, not as negotiators or diplomats, it is not meant to suggest that experience in political or diplomatic life would disqualify a judge for the performance of judicial duties. As the politician deals with political questions, he is clearly out of place in a court of justice, although a broad experience in political affairs may strengthen the judgment of the individual judge and thus enhance his efficiency. The diplomat, as such, is likewise out of place in a court of justice,

because we do not wish to weigh the claim of one against the other and strike a balance. A compromise is out of place, and negotiations are excluded. Experience, however, in diplomatic life is of value, indeed of great value, but it can only enlarge the view and thus increase the usefulness of the judge individually. Political experience and diplomatic training cannot make up for the lack of the judicial mind and the legal way of thought.

It is difficult to conceive of a court of justice without judges trained in the administration of justice. It is as difficult, — indeed it is well-nigh impossible, — to think of a court without at one and the same time having in mind the jurisdiction of the court. An international court does not compete with a national court. The questions submitted to it are not of a national or municipal character. They are of an international character, to be determined according to international equity and international law. It necessarily follows that the jurisdiction of such a court would be different from the jurisdiction of a national court. The one point in common is that each should have a certain sphere of jurisdiction if it is to function as a court. In what, then, may the jurisdiction of an international court consist? Clearly it can have no original jurisdiction. Its jurisdiction must be conferred upon it specifically, for when created it is as powerless and helpless as the newborn babe. The jurisdiction must be conferred upon it expressly, and it would seem that this may happen in several ways. First, the signatory powers may conclude a *general* treaty of arbitration and may agree that all differences of an international nature shall be considered. Or, second, if the signatory powers do not conclude a general agreement, the positive jurisdiction of the court may be based upon the separate treaties of arbitration already concluded between the nations.

In either case the court will be clothed with a certain jurisdiction; for, as the powers have agreed collectively or singly to refer certain matters to the Permanent Court, it follows that the court possesses the competence to examine these. In a word, the court possesses obligatory jurisdiction in certain defined and ascertained cases.

But it may well happen that nations may, in the absence of a treaty of arbitration, be willing to submit special differences arising between them to the judgment and determination of the court. As the jurisdiction in such cases would be occasional, and as it would depend

wholly upon the volition of the parties in controversy, it may be called voluntary or facultative jurisdiction. It is a matter of no great importance whether the jurisdiction is obligatory or whether it is facultative, provided only that questions be submitted to the court for their determination. And it is believed that particular questions will be submitted to the court as soon as the court justifies its existence, and that these submissions will be more frequent in proportion as the court wins universal confidence and trust. It is therefore no objection to the court that the obligatory jurisdiction may be small, provided only that the facultative jurisdiction be large. And it will, in the nature of things, be large if the court be permanent, if it be composed of judges, and if the decisions of the judges satisfy the judicial conscience.

The very permanency of the court will go far to create the confidence which a line of carefully considered and authoritative precedents will justify. For it is important that the court and its personnel be permanent in order that a permanent body of international doctrine be developed. Each decision will be a milestone in the line of progress and will forecast a highly developed, comprehensive, and universal system of international law. But to create a precedent and to secure its recognition it is necessary that the decision itself shall be impartial, according to the law of the case, and the surroundings of the court should be such as to allay suspicion of partiality. Judges of training and experience, serving for years instead of for a few weeks, will develop a judicial faculty, even although its presence be not so marked at the date of appointment. An arbiter, chosen for a particular purpose by a particular government, after weighing his strength and his weakness, after an examination of his writings or utterances, may be discredited in advance and doubts cast upon his impartiality, because it is well known that nations as well as men are inclined to appoint those favorable, not those unfavorable, to their views. There is, therefore, great danger that the arbiter be but slightly removed from the advocate; whereas the judge, by virtue of his tenure, cannot, in the nature of things, be exposed to this danger or to this criticism. It is not too much to say, therefore, that the confidence which the court may inspire will depend as much upon the permanence of tenure as upon the character and attainments of the individual judges.

It is probable that the views already presented may meet with general acceptance, but the important question still remains, How

is this Permanent Court, composed of judges, to be constituted? No attempt is made to disguise the difficulty and importance of this question; for if it were an easy task, we would not be engaged in discussing it in this year of grace 1907.

It is obvious at the outstart that a court, to be truly international, should represent not only one or many but all nations. It is equally obvious that a court composed of a single representative from each independent and sovereign nation would be unwieldy. Forty-five judges, sitting together, might compose a judicial assembly; they would not constitute a court. And our purpose is to establish a court, not to call into existence a judicial assembly.

In international law all states are equal. As our great Chief Justice Marshall said:

> No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates itself, and its legislation can operate on itself alone (The *Antelope*, 1825, 10 Wheaton, 66, 122).

It follows, then, that however desirable a permanent court may be, it cannot be imposed upon any nation. The court can only exist for this nation by reason of its express consent. If it be said that all states are equal, it necessarily follows that the conception of great and small powers finds no place in a correct system of international law. It is only when we leave the realm of law and face brute force that inequality appears. It is only when the sword is thrown upon the scales of justice that the balance tips; or, to quote the fine words of our honored president, M. Léon Bourgeois, uttered in a moment of inspiration:

> Gentlemen, what is now the rule among individual men will hereafter obtain among nations. Such international institutions as these will be the protection of the weak against the powerful. In the conflicts of brute force, where fighters of flesh and with steel are in line, we may speak of great powers and small, of weak and of mighty. When swords are thrown in the balance, one side may easily outweigh the other. But in the weighing of rights and ideas disparity ceases, and the rights of the smallest and the weakest powers count as much in the scales as those of the mightiest.

In matters of justice there can be no distinction, for every state, be it large or small, has an equal interest that justice be done. If, therefore, a permanent court be constructed upon the basis of abstract right,

equality, and justice, it would follow that each state would sit, of right within an international tribunal, and we will be confronted with a list of judges, — with a panel, not a court. Recognizing the equality of right and the equality of interest in law, and giving full effect to this equality in the constitution of a permanent court, we must yet find some other principle upon which to base it if we wish to erect a small court of a permanent nature.

Fortunately another principle exists. While all states are equal in international law, and while their interest in justice is the same, or should be the same, there is a great difference between nations considered from the standpoint of material interests. And fortunately material interests are independent of the question of power, for power, in the international sense of the word, means physical force, and physical force is alien to the conception of right. The principle of construction cannot be based upon the relative strength or weakness of nations; but while nations have an equal interest in justice in the abstract, this interest may manifest itself more frequently in the concrete. The interests of a large and populous state are widespread, indeed universal, and complications and differences are most likely to arise where these interests come into conflict. It cannot be said that lawsuits bear a mathematical and constant relation to population. A state of thirty millions may not have six times as many lawsuits as a state of five millions, and it is to be hoped that this is not so. But there is a sensible relation between population, wealth, and industry on the one hand and lawsuits on the other. If we compare the states of the American Union, we will see at a glance that the law reports of the state of New York compared with the law reports of Rhode Island and Delaware, our smallest states in population as well as in size, show the greater material interest in the state of New York in courts of justice. Population and the business necessarily arising and inseparable from population make a recourse to the courts of justice in New York the rule, while in the smaller states it would seem to be the exception. It follows, therefore, in practice as in theory, that the state of New York has many more law courts and infinitely more judges, simply because the needs of the population are in this way met.

The foregoing illustration would apply to an international as well as to a municipal or national court. The greater the population, the greater the business; the greater the business, the more frequent the

conflict of interests involving a recourse to a court of justice. An international court would seem to be at the present day as much a necessity as the municipal court is a necessity, for international interests, in their infinite variety and complexity, would or should be referred to an international court, just as conflicts arising wholly within one jurisdiction are referred to the municipal court of the particular nation in question. The municipal court is created to meet the national need. An international court should be created and exist to meet the international need, and it is not to be expected that nations with great material interests will be content to support or accept an international court which does not recognize these interests, and in which these interests are not represented. Material interests may, however, be very large or may be very small, and the difficulty of estimating the value of a particular interest, and the extent to which it should find representation in a court, would seem to render it either impossible or inexpedient as a basis for the constitution of an international court.

It has been stated — and any geography or gazetteer will furnish the proof — that material interests and populations go hand in hand; that a large population has, by reason of its largeness, material needs which must be satisfied; that industry and commerce spring up to meet these needs, and in satisfying them wealth results. If, therefore, population draws to itself industry and commerce, and if courts of justice, in a civil and commercial sense, are created to resolve commercial or civic differences, it would seem that population (which is easily determinable) may be chosen as a basis of representation because of the direct relation existing between population on the one hand and industry and commerce on the other. Population is a natural principle, and a court of justice based upon the principle of population thus recognizes an actual and natural principle. Business interests are at one and the same time likewise recognized, and justice is administered clearly and impartially, if only the personnel of the court be properly selected.

Admitting that population may be taken as an element upon which to constitute an international court, it is necessary to state, with clearness and precision, the population which shall give a unit of representation. If the required population be very small, it follows that the membership of the court, chosen in accordance with population, will be very large; and, on the other hand, if a very high degree of population be

required, it follows that the membership of the court will be correspondingly small. But whatever unit be chosen, no state, however populous, should have more than one member in the court, for a single member calls attention to the existence of the state as a political unit, and represents at one and the same time its population, industry, and commerce.

It is therefore necessary to choose the golden mean in such a way that the membership of the court shall not be so large as to make it unwieldy, nor so small as to leave unrepresented important international interests. It seems probable that a court composed of fifteen or sixteen judges would be manageable, and adequate for all our present international needs.

If it be true that population and material interests bear a sensible proportion to each other, it follows that the entire population of a country should be included, and that its right to representation should depend upon this combined population, for it is not merely the interests of the home country, but the interests of the colonies, that come before courts of justice.

If it be admitted that population is a satisfactory basis upon which to erect a substantial and permanent court of arbitration, it would not follow that we had composed the court, although we had taken a step toward it by establishing approximately the number of judges of the court. We must determine the law to be enforced. The problem here is complicated by the fact that many systems of law exist and that these various systems must find adequate representation. As a rule, a single system of law obtains in a municipal court; another system obtains in another court. These two systems, administered in one and the same court, would not make the tribunal a court of international law; for, to be truly international, it must embrace the various systems of the world. When this is done it becomes a world court. If the Permanent Court of Arbitration is to judge according to equity and international law, it must not be the equity of any one system, but the equity which is the resultant of the various systems of law. Just as the individual rarely frees himself from his environment, so the jurist is influenced by his system of law and the training in it. Supposing, therefore, that each is influenced by his training; it is necessary to have judges trained in the various systems of law in order that the equity administered by the court may be truly the spirit of the laws.

For the purposes of the Permanent Court of Arbitration municipal law must be internationalized. In this case, and in this case only, can the judgment be equitable in any international sense, and the judgment so formed will be based upon international equity as well as international law.

It is stated that a jurist is the product of his training. It is likewise true that the individual is influenced by the environment, and possesses, in a higher or less degree, the characteristics of his nation. It would be futile — if, indeed, it were possible — to denationalize a judge. But the presence in the court of judges trained in the various systems of law, and representing in their intellectual development characteristics of their respective nations, would go far towards engendering an international spirit.

The project which the American delegation has the honor to present recognizes the existence of the various systems of law and gives adequate representation to them.

For example, the Roman law, constituting the basis of so many European systems, would be represented in its present and modified forms. The common law of England would be represented, and the common law of England as modified in the western world would not be overlooked. The nations of Europe which have given law to the western world would sit, of right, in the court, and at one and the same time the modifications of this law, to meet the needs of the New World, would be before the court. For example, the law of Spain — the source of law in Latin America — would appear both in its European and American form.

The question of language is one of great difficulty, and languages as such should be represented in the court. To one sitting in the conference day by day and observing the difficulty with which the idea clothes itself in French form, it must be a matter of great importance that the languages should find representation in the court, so that the judge and client may be upon speaking terms.

If a question of Spanish law is involved, it is important that the judge understand Spanish. If a matter of Russian law be under consideration, a knowledge of Russian might well be fundamental. An examination of the American project shows that the principle of population does ample justice to the languages most widely spoken at the present day.

Finally, a court, to be international, must take note of the existence of the nations of the world, and these nations must find adequate representation in the court. The principle of population adopted shows that the four quarters of the globe would be represented in the court.

It may have seemed strange, at first sight, that the American project bases itself upon the principle of population, but when it is seen that the principle of population does justice to the industry and commerce of the world; that it likewise represents the various systems of law; that it includes within itself the languages, and that political geography is not overlooked, it becomes at once evident that the principle of population was selected not for any virtue of its own but because it adequately and equitably represents and embodies the elements essential to the constitution and operation of a permanent court of arbitration.

In a word, our principle recognizes the existence of nations, and their continued existence, as political units, but declares solemnly that for the purposes of justice there is but one people.

In the observations which I have had the honor to submit I have dwelt upon the fundamental underlying principles of the American project without considering matters of detail. Did time permit, it could easily be shown how a permanent court of arbitration, composed of fifteen or sixteen judges, would fulfill the mission now confided to other and variously constituted bodies.

For example, should parties to a controversy desire a summary proceeding, they might request a special detail of three or five judges from the Permanent Court of Arbitration by striking alternately from the list an equal number until the desired number remained. Powers desiring to form a commission of inquiry for a particular purpose could resort to the Permanent Court of Arbitration and constitute a commission in the above-described manner, and add thereto an equal number of nationals from each of the parties. It would require no great powers of imagination to devise a method by which the personnel of the Permanent Court of Arbitration might be modified to meet regulations and requirements of a court of prize; and finally, by special consent of the parties to a controversy, decisions of commissions of arbitration might be referred to the Permanent Court of Arbitration to be reviewed and revised, or to have the relative duties and liabilities under the findings submitted to further examination.

Without considering further details, and without prolonging a discourse already long, I beg to express the conviction that the mere existence of a permanent court of arbitration, composed of a limited number of judges trained in municipal law and experienced in the law of nations, would be a guarantee of peace. As long as men are what they are, and nations are formed of ordinary men, we shall be exposed to war and rumors of war. The generous and high-minded may seek to ameliorate the evils and misfortunes of armed conflict, but it is certainly a nobler task, and a more beneficent one, to remove the causes which, if unremoved, might lead to a resort to arms. The safest and surest means to prevent war is to minimize the causes of war and to remove, as far as possible, its pretexts. Justice, as administered in municipal courts, has done away with the principle of self-help and the use of force as a means of redress. An international court where justice is administered equally and impartially to the small as well as to the great will go far to substitute the rule of law for the rule of man, order for disorder, equilibrium for instability, peace and content for disorder and apprehension of the future. To employ the language of a distinguished colleague, M. de Martens, the line of progress is *par la justice vers la paix.*

3. MR. CHOATE'S REMARKS ON INTRODUCING THE PROPOSED COURT OF ARBITRAL JUSTICE, AUGUST 13, 1907[1]

Ever since the appointment of the Committee of Examination this project has been the object of serious study by the three governments of Germany, the United States, and Great Britain. We shall be much disappointed if it be not accepted.

The creation of the court would realize our highest aspirations, namely, the development of arbitration as an institution. We are unalterably convinced that the establishment of this court will be a great progress. The fact that the results of the actual organization are so insignificant shows that the nations are in need of something more permanent and more substantial. It will be observed that the project does not modify in the slightest the present Permanent Court. For a variety of reasons there may be numerous cases which do not lend themselves to the decision of the new court, and there are doubtless

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, Committee of Examination B, August 13, 1907), Vol. II, pp. 593–594.

powers which do not wish to resort to this new institution. These cases are within the scope and jurisdiction of the Permanent Court of 1899, which will remain at the disposition of the powers. We suppress nothing; we add another means of international conciliation.

We desire a court easy of access, open to the whole world, composed of judges representing all the systems of jurisprudence of the world, and, as the representative of all the nations of the world, we have naturally endeavored to include in the composition of the court representatives of the entire world.

In addition, the court should be able to assure the continuity of jurisprudence. The present Permanent Court has not gone far in the direction of establishing and developing international law. Each case is isolated, lacking both continuity and connection with the other. A permanent tribunal, deciding cases in relation with each other, would evidently be a means of unifying the law, and therefore claims on this account the attention of the world.

I shall not develop the details of our project as adopted by the three powers. The points about which we differ have been noted in the margin, and the decision is left to the wisdom of the committee.

A section of the court will be organized to adjust urgent cases, in such a manner as to be always in session, ready to receive and decide the case presented.

For the discussion of the project we might properly adopt the method followed in the consideration of the prize court, that is to say, to reserve the right to vote only after discussion, and to reserve the consideration and determination of the question of judges until the end.

The establishment of the court will be not merely a mark of progress; it will be an institution, irreproachable and just to all nations. It is a tribunal so ardently awaited by the world that we should be justified in creating it, even although every state should not accept it, provided only the door be left open to all. You have not forgotten that the First Conference left open the question of adherence, and little by little the nations have adhered. If necessary, let us do the same for this truly Permanent Court.

There is everywhere a mass of cases awaiting the judges. Therefore let us hasten to the work, and under the vigorous direction of our president [M. Bourgeois] we shall make great progress.

4. MR. SCOTT'S ADDRESS, INTRODUCING THE SUGGESTED COMPOSITION OF THE COURT OF ARBITRAL JUSTICE, AUGUST 17, 1907[1]

The project for the organization and jurisdiction of a permanent court, which the three delegations have had the honor to lay before the committee, necessarily presupposes the presence of judges, for without their presence the court exists, if at all, in name, not in fact. The selection of the judges, therefore, is of fundamental importance, and it may be said that the creation of the court depends in large measure upon a method of selection which shall satisfy the legitimate desires of the countries represented at the conference.

If each country were to appoint one judge, and if these judges so appointed should be entitled to sit at one and the same time, the problem would be simple. Forty-six judges, however, form a judicial assembly, not a court. We wish, however, a court, not a judicial assembly. It would seem that a court of the kind we propose should not consist of more than fifteen or seventeen members without becoming unwieldy, and on that theory it is necessary that some means be devised for the selection of that or of a smaller number. The difficulty of the problem is at once apparent, but difficult as it is, the problem must be solved. It is evident that no plan can be satisfactory which denies to every state the right to representation, for in international law the equality of right is axiomatic.

Each state — be it large or small, an empire of hundred of millions or a republic of a few hundred thousands — should possess the right to appoint, and should actually appoint, a judge of its own choice for the full period contemplated by the convention, namely twelve years. The exclusion of a single state from the proposed court, or the denial of the right of a single state to appoint, would proclaim the principle of juridical inequality and vitiate in advance a project, however carefully it be drawn and however acceptable it might otherwise be.

It may be admitted, however, that the exercise of the right might be regulated without in any way questioning the existence of the right. If every nation has the right to appoint, and does appoint, a judge, it is no derogation to the principle of sovereignty and equality that the judges so selected may sit at various times and may sit in rotation.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, Committee of Examination B, August 17, 1907), Vol. II, pp. 606–609.

Great as is the difficulty, we feel that it is capable of solution, and we also feel that this committee can propose a satisfactory method, if it be the earnest and sincere desire of the committee, to solve the problem and thus to establish the court.

Animated by the desire to establish the court and to contribute effectively to its creation, we submit, with great diffidence, to your careful consideration a plan, frankly admitting its imperfections, but feeling that it may be acceptable unless a better plan should be proposed. The plan which we lay before you is based, in general, upon the principle of population, for we believe it self-evident that large aggregations of people have large interests, and that there is, in general, a relation between population on the one hand and industry and commerce on the other.

We also believe that industry and commerce give rise to conflicts, and that it may well be that a nation with a very numerous population, and with large commercial and industrial interests, feels it necessary to have a constant representation in a court, in order that its interests may be protected and safeguarded by a judge of its own choice.

We admit, however, that the interest of the smaller nation is just as keen, although the conflict may be less frequent or less serious; and it would seem just, therefore, that the smaller nation should not be deprived of the same right to watch over and protect its interests by a judge of its own choice.

We do not believe that any one principle should be pushed to its logical extreme without due regard to other interests. The theorist and logician might be content to rise or fall by a principle of their own selection. The practical man — the man of affairs, the statesman — must many a time modify, indeed sacrifice, a principle, however just, to meet a present and pressing need.

While, therefore, we have adopted population in general as a satisfactory principle, we have at one and the same time considered the interests of industry and commerce, and we have consciously departed from the principle in order to do justice to various material interests.

We have also felt that the systems of law at present existing in the civilized world should be considered, and we have not hesitated to depart from the principle of population, or to give less attention to industry and commerce, when different systems of jurisprudence

demanded recognition. Nor have we been unmindful of the traditions of the past, and we confess that in apportioning representation in the court we have not overlooked the fact that great traditions have a pressing claim upon us, and that they may well of themselves modify the results that would spring from the rigid application of an abstract principle. Questions of political geography have also influenced us, and we have taken into consideration the geographical situation as affecting the liability to international conflict.

Should we apply exclusively the principle of population without taking into consideration other elements which complicate the problem, we feel that injustice might be done to less populous states. But whatever these elements may be, we must insist that no distinction be made between the states of Europe and of America possessing approximately the same qualifications, whether those qualifications be population, industry, commerce.

It seems to us, therefore, possible to assign to certain states a permanent representation in the court, and, with due regard to population, industry, commerce, systems of law, and language, to permit each state representation for a longer or shorter period by a system of rotation.

A careful analysis of the table which we have the honor to lay before you shows that in each year the various languages, the various systems of law, will be represented, and that the Spanish-American law will be represented every year by two or more judges out of seventeen.[1]

It should be stated further that each country entitled to appoint a judge is entitled to appoint a deputy judge for a like period, and that in the absence of the principal judge the deputy may sit. Should the state prefer to appoint one judge for a term and the same judge as a deputy for a like period, to serve during the absence or incapacity of a principal judge of another nation, it would follow that each state would have a right to additional representation, as will appear from the table before you.

The method suggested leaves to each state the right to be represented, and regulates, it is hoped, in a fair and equitable manner the exercise of this right. Should, however, nations prefer to combine, thus forming groups, and elect judges and deputy judges for the sum total of their terms, the system proposed is flexible enough to permit

[1] For tables accompanying the above address, see Appendix, pp. 210–211.

this. Each state is thus left entire liberty, either to be represented directly by a judge of its own nation or to combine with others to select a common judge for a longer period.

As the result of careful and prolonged discussion it seems probable that each nation prefers to have a judge of its own choice upon the bench whenever it appears before the court as plaintiff or defendant. Should this be the preference of the committee, we are prepared to submit a plan which will permit the appointment of a judge of each of the litigant parties when such judge is not already upon the bench. In this way each nation before the court may be represented by agent, advocate, and counsel in order to see that its case is properly presented to the consideration of the court, and will have, in addition, a judge upon the bench itself in order to see that the case, as presented, receives the careful consideration of the court. The rights of the litigants will thus be protected and safeguarded in the council chamber as well as in the court room.

It therefore appears that the system we propose to you establishes a permanent nucleus of the court; that each nation is, within the period chosen, represented within the court, and that each nation, in a larger or smaller degree, contributes to the judicial determination and development of international law; that each nation, whenever it appears as party plaintiff or defendant, may be represented upon the court by a judge of its own appointment, whose duty it is to see that the arguments advanced by counsel receive that careful consideration which is to be expected from judges of character and attainment. The general interest which all nations have in the advancement of international law is thus secured, and the special interest which each litigant has in the outcome of a controversy is not overlooked.

We are conscious, however, that the plan we present to you, however correct or acceptable it may be in principle, and however satisfactory it may be in practice, is nevertheless open to criticism. We assure you, however, that the plan presented is not the result of a sudden inspiration, but is the result of careful, indeed painstaking, examination of the problem and the means by which it may be met and solved.

We feel that each state will consider itself entitled to greater consideration than is assigned to it, but we hope the system we propose is so reasonable as to prove acceptable, — at least in theory.

It will be noted that the table presented is based upon the juridical equality of all the states represented in or invited to the conference, and that each state, therefore, has and must have the right to appoint a judge for the proposed court, even although the judges may serve in rotation and for shorter periods. In proposing that the judges appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia serve for the full period of the convention, we do not lose sight of the juridical equality, but recognize the fact that the greater population, industry, and commerce of these states entitle them to a correspondingly greater, that is larger, participation in the court. It should be noted, however, that although the judges of these populous states would form a permanent nucleus, they do not constitute the quorum of the court.

It may well be that other and different combinations will be more satisfactory to the members of the committee. We present this plan for the composition of the court in the hope that it may at least serve as a basis for discussion and suggestion, even though it should not be acceptable in all its details.

5. MR. CHOATE'S ADDRESS ON THE COMPOSITION OF THE PROPOSED COURT OF ARBITRAL JUSTICE SEPTEMBER 5, 1907[1]

The committee has now reached a stage in its deliberations which marks a most important advance towards the creation of a permanent court of arbitration which shall satisfy the universal demand that presses upon us. We have decided with practical unanimity that there shall be such a court, and have adopted a constitution for its organization and powers with equal unanimity. It is true that the representatives of several powers have declined to take part in the discussions involved in the second reading of the projet until they should know what plan would be adopted for determining the number of the judges of the court and the mode of their partition among the nations. But I do not understand that even those nations find any objection to any feature of the projet, and, in fact, the observations which fell from them, and their acquiescence in the action of the committee on the first reading of the projet, manifested an entire approval of it.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, Committee of Examination B, September 5, 1907), Vol. II, pp. 683–687 (689–693).

If the conference could do no more than this, it would have made very marked progress in the work, for in the First Conference the very idea of the creation of such a court was promptly laid aside as impracticable, if not impossible. But we owe it to ourselves, and to the nations that we represent, not to let the work stop here, but, by a supreme effort for conciliation, to agree upon the important and vital subject of determining the number of judges and the mode of their distribution and the measure of their action. Whether we do this permanently or provisionally is not of very great consequence. To accomplish it in either way will make the conference a great success. If we fail to bring it about in one way or the other, the conference itself will be to that extent a failure. And having come to The Hague accredited by the nations that sent us, we shall return to them seriously discredited.

It may, therefore, not be out of place for me, who originally introduced the proposition for the court, — which up to this point has been sustained with such general favor, — to review very briefly the various suggestions that have been made on this important subject.

When the subcommittee that had in charge the preparation of the projet, consisting of one from each of the delegations, — British, German, and American, — had completed it, they attempted to devise a scheme, a possible scheme, which should serve as a basis of discussion and challenge the presentation of any and every other scheme that any member of the committee might regard as possible. It was not even recommended by them for adoption, nor was it in any sense a joint scheme of the three powers or a separate scheme of either, — American, British, or German. It recognized and was based upon the equal sovereignty of the nations, and took account at the same time of the differences that existed between them in population, in territory, in commerce, in language, in systems of law, and in other respects, and especially the difference in the interests which the several nations would normally and naturally have at stake in the proceedings before the court and in the exercise of its jurisdiction. It provided for a court of seventeen judges, to be organized for a period of twelve years, and that of the seventeen, eight nations, who will be generally recognized as having the greatest interests at stake in the exercise by the court of its powers, should each have a judge sitting during the whole period of the organization.

It provided also that each of the other powers should appoint, in the same way and at the same time, a judge for the same period, but who should be called to the exercise of judicial functions in the court for variously measured periods, according to their population, territorial extent, commerce, and probable interest at stake before the court, these measured periods ranging from ten years down to one.

By this method the absolute and equal sovereignty of each of the forty-five powers was duly respected and their differences in other respects not lost sight of.

The presentation and distribution of this scheme, as an anonymous one, has answered the purpose of inviting abundant criticism and the presentation of counterschemes. The main objection to it, held by many of the nations to whom it assigned less than a full period for the exercise of judicial functions by their judges, has been that the failure to give to the judges appointed by each nation full power to sit all the time, was in some way a derogation from the dignity and sovereignty of each of them, and that the same principle which recognized the equal sovereignty of each of the forty-five nations required a recognition of the claim that they were equal in all other respects. This claim, if insisted and acted upon, would of course render the establishment of an international court on any such basis of partition an absolute impossibility, and require a court of forty-five judges sitting all the time.

As was expected, a very interesting counterscheme was proposed, based upon the alleged equality, not only in sovereignty but in all other respects, of all the states. It proposed to abolish the existing court, and for a new court to be constituted, consisting of forty-five judges, one to be appointed by each state, and these to be divided into groups in alphabetical order, of fifteen each, which were to sit for alternate periods of three years. This scheme was offered as an illustration of what was possible, based upon a recognition of the absolute equality of all states. Two objections to it were suggested: first, that an allotment of periods by alphabetical order was really the creation of a court by chance; and second, that it deprived each nation of any hand or voice in the court for six years out of the nine for which it proposed to establish it; whereas the first scheme had given every nation a seat in the court by a permanent judge for a fixed period, besides the

right to have a judge of its own appointment upon the court whenever it had a case before it for decision.

Another proposal has been that seventeen nations, including the eight first mentioned and nine others which together should represent all parts of the world, all languages, systems of law, races, and human interests, should be selected by the conference, with a power to each to appoint a judge for the whole term of the court, thus recognizing the principle of equality of sovereignty to be exercised in the power of creating the court and selecting the judges.

Another proposal has been that four judges should be assigned to America, as a unit, trusting to that cordial and friendly relation which exists at the present time, and it is hoped will always exist, between the United States and all other nations of Central and South America, and which has been successfully fostered and maintained by several Pan-American conferences, to enable them to make a distribution among themselves of the four judges so assigned, in a manner that should be satisfactory to all.

This plan would have relieved the problem of all questions raised in regard to America, and would have left it for the other nations to make a similar distribution of the thirteen judges among themselves, which it was hoped might be done by means of the peaceful and friendly relations now existing between all the nations of both continents.

The practicability of this scheme, as of all the others, is still open for the consideration of the committee.

The suggestion has also been made, that for the purpose of the partition of the judges of the court the nations should be classified upon the sole element of comparative population; but it has been found, upon examination, that there were so many other essential factors that ought, upon every principle of justice and common sense, to enter into the distribution of judges that no definite project for such a distribution has been proposed.

The statements already made demonstrate the extreme delicacy and difficulty of the problem presented to the conference in the formation of the Permanent Court, but I confidently believe that it is entirely within the power of the committee, on a frank and candid exchange of views, and with the disposition that possesses it, to make such mutual concessions as may be necessary to solve the problem.

It has been suggested that it would be better to put the several plans proposed to the vote, so as to draw the line of distinction clearly between its advocates and its opponents; but, as all are believed to be in favor of the Permanent Court, the expediency of such a proposition is doubtful, for such a vote would not in any way indicate what nations were in favor of a permanent court and which of them were opposed. And to have the project of a court voted down because linked with a scheme for the distribution of judges that was unacceptable to a majority, would convey to the world a wrong impression, — that the conference was not in favor of the creation of such a court.

It has also been suggested that the difficulty should be regarded as insuperable in the present conference, and avoided, or rather evaded, by securing a unanimous vote for the establishment of the court upon the constitution now under consideration, and leaving it to the powers or to the next conference to establish, if possible, a mode of selecting the judges that should be satisfactory to all the powers.

As I have already said, the adoption of this plan would be perhaps an advance upon anything that has heretofore been accomplished. But it would be surely a serious failure, and should not be resorted to with any false illusions, as it might practically result in the burial of the project for a permanent court altogether.

We must solve the problem — either permanently or provisionally. This is a solemn duty that rests upon us, and it would be ignominious in the last degree for us to confess our inability to discharge it; and we therefore have to consider a wholly different method from any of those heretofore suggested, namely, a free election by the whole conference, voting by states, each exercising sovereign power on an absolute equality, and accepting the result of such an election, as electors or elected, as such an exercise of the elective power might produce.

There is nothing to prevent the conference voting freely and without any restraints whatever for a definite number of nations, — seven or nine or eleven, thirteen or seventeen, — who should each be authorized to appoint a judge for the full term of the court. This would concede all that is claimed in the way not only of equal sovereignty but of equality in all other respects, and each nation would take its chance of a successful canvass, and I have no doubt it would result in the successful establishment of an excellent court to which all nations could

resort or refrain from resorting in each case that should arise, as they should see fit.

Another plan worthy of consideration, and which, I think, might successfully solve the problem, is to resort to an election — in which all the states should have an equal voice — of individuals, jurists, or statesmen of distinction, to constitute the court. If this method is resorted to, it might be in connection with the plan for establishing the court and its constitution, and leaving the method of final and permanent selection of judges to the nations or to the next conference. For it might and perhaps ought to be resorted to as a temporary and provisional plan to secure the organization of the court as soon as it should be ratified by a sufficient number of powers constituting a majority.

The plan would be for an election, each state casting one vote, of a prescribed number of judges, which should be deemed suitable for the temporary and provisional organization of the court, to hold office either until the next conference or for a specified number of years, or until the powers, by a diplomatic interchange of views, should adopt some different method as a permanency.

There is ample material within the conference itself and within the existing court, in the constitution of which all the powers have had an equal hand, for the creation and installation of such a tribunal provisionally. The selection might be limited to the members of the existing court, or extended to other jurists whose names are familiar to all, every one of them of the highest character and of world-wide reputation, and any quorum of whom, sitting as a court, would command the confidence and admiration of the entire world, and be relied upon to do justice in any case that might arise. For one, speaking for the United States of America, I should be perfectly willing to intrust the fortunes of the court, and the success of this conference in creating it, to the result of any election that might be made as suggested, and I hope that it will be taken into serious consideration and recommended for action by the committee, in the event of no plan being proposed that can command more general approval.

A further method of election, under further limitations, has been proposed and is also worthy of consideration, and that is, that the nations should nominate each a number of jurists, selected from the old court or at large, to constitute the new court, whether provisionally or

permanently; that these nominations should be received by an executive committee of three, to be appointed by the president of the conference; and that the names of all candidates nominated by five or more powers should be placed upon a ballot and offered for the final choice of the conference, voting by states; and that those receiving the largest number of votes on such final ballot, to the requisite number prescribed for the court, should be declared the elected judges.

I am not without hope that still other plans will be evolved from the discussion of this intricate and important matter which is now to take place that may command the approval of the committee and secure the establishment of the court.

So sure am I that the establishment and organization of the court will be a great triumph of civilization and justice, and an effectual guarantee of the peace of the world, that I would urge, with all the earnestness of which I am capable, the adoption even of one of the provisional schemes referred to, if no permanent method for the choice of judges can be now agreed upon. And I trust that, laying aside all prejudices and national differences, all pride of opinion and all desire to secure special advantages for our respective nations, we shall devote ourselves, with one mind and one heart, to the solution of the problem that is now before us.

6. MR. CHOATE'S REMARKS ON THE SELECTION OF THE JUDGES OF THE COURT OF ARBITRAL JUSTICE BY THE PRINCIPLE OF ELECTION, SEPTEMBER 18, 1907[1]

I do not think that the time has come to give ourselves up to despair. We must do something to realize the hopes of the civilized world.

It follows from the speech of M. Barbosa that he objects to accepting any other plan than his own. That is another form of despair. But in any case, as the president has very clearly shown, the investigating committee has not yet decided the question.

Many plans have been presented to this committee, but they have not been sufficiently studied and discussed.

I persist in thinking that the *plan of rotation* would be the cleverest and the most just. However, in face of the opposition of certain powers, we have given it up.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, Committee of Examination B, September 18, 1907), Vol. II, pp. 697–699.

The only method which, under the present conditions, offers any chance of success is therefore that of the *election* of a court, whether it be a permanent or a provisional one.

The objections made to this method of composition of the court are purely imaginary. It is the laying down of distrust as a principle, — the distrust of the wisdom and of the loyalty of the electors.

One fears the coalitions of small powers against the great. I declare that I do not share these apprehensions.

The representatives of the small nations are as qualified to be electors as the others, and they will agree to choose the best judges, independently of nationality. And assuredly, worthy judges can be found among the subjects of these same small nations. If we have not confidence in each other, why do we strive, then, to conclude a convention? Why do we not adopt a method which admits the principle of the equality of nations?

For myself, personally, I would run the risk of an election, whether it be made by the governments, or by the Permanent Court, or by this same conference, provided that all nationalities, all languages, and all systems of law be represented. It matters little to me whether my nation may have a judge or not. We are not here for the sole advantage of our own country, but for the benefit of the community of nations.

The plan of M. de Martens, which has been submitted to us, is excellent as a whole. He proposes that each country designate an elector, taken from the list of the members of the Permanent Court, and that these forty-five electors should, in their turn, choose fifteen judges, who should form the court.

Nevertheless, in this plan a certain number of judges is ascribed to Europe, to America, and to Asia, and that is its vulnerable point, for that recalls to mind the old plan of rotation. On the other hand, it does not appear indispensable to assemble again all the electors at The Hague, for practically the vote would be issued by the governments. One could therefore dispense with the formality of the reunion and have the electors vote through the medium of the bureau.[1]

I take the liberty in this class of ideas to make a proposition to the committee which seems to me to answer all of the objections.

[1] The institution referred to is the international bureau, which is the record office of the so-called Permanent Court and "the channel for communications relative to the meetings of the court" (Convention of 1899, for the Pacific Settlement of International Disputes, Art. 23; Revision of 1907, Art. 44).

Proposition with Regard to the Composition of the Court of Arbitral Justice

Article 1. Every signatory power shall have the privilege of appointing a judge and an assistant qualified for and disposed to accept such positions and to transmit the names to the international bureau.

Article 2. The bureau, that being the case, shall make a list of all the proposed judges and assistants, with indication of the nations proposing them, and shall transmit it to all the signatory powers.

Article 3. Each signatory power shall signify to the bureau which one of the judges and assistants thus named it chooses, each nation voting for fifteen judges and fifteen assistants at the same time.

Article 4. The bureau, on receiving the list thus voted for, shall make out a list of the names of the fifteen judges and of the fifteen assistants having received the greatest number of votes.

Article 5. In the case of an equality of votes affecting the selection of the fifteen judges and the fifteen assistants, the choice between them shall be by a drawing by lot made by the bureau.

Article 6. In case of vacancy arising in a position of judge or of assistant, the vacancy shall be filled by the nation to which the judge or assistant belonged.

This plan is so simple that there is no need of long discussions. If fifteen nations only accept it, it could become the point of departure of a general agreement. The example of 1899 is there to prove that the adhesions could come afterwards.

The immediate adhesion of any particular nation, great or small, would not be indispensable. This would be an experiment, and the nations who would not accept it to-day would be able to come to a decision later on.

I think that my proposition, if it is adopted, will give us good judges and will satisfy all the world.

It is a matter of indifference to me whether the election takes place here or elsewhere, whether the court be permanent or provisional, constituted for five, for three, for two years, provided that we may not return to our countries with empty hands. It is better to do something than to do nothing. I do not yet share the despair which some of the delegates who support our plan have expressed. As long as the conference lives there is cause for hope.

VI. MR. SCOTT'S REPORT TO THE CONFERENCE RECOMMENDING THE ESTABLISHMENT OF A COURT OF ARBITRAL JUSTICE OCTOBER 16, 1907[1]

[The following report of the Committee of Examination B was prepared by Mr. Scott of the American delegation for submission to the First Commission. It is here printed, believing that it may be of some interest as an example of the official report presented to the conference, and for the further reason that it contains an elaborate and detailed exposition of the project of a court of arbitral justice, accepted by the conference and recommended for establishment through diplomatic channels.[2]

The recommendation appears in the Final Act of the conference in the following language:

The conference recommends to the signatory powers the adoption of the project hereunto annexed of a convention for the establishment of a court of arbitral justice, and putting it in force as soon as an agreement has been reached upon the selection of judges and the constitution of the court.]

Inter leges silent arma

Gentlemen:

Before undertaking the systematic exposition and analysis of the project for the establishment of the court of arbitral justice, voted by the Committee of Examination B and referred to the subcommission of the First Commission, it may be advisable to devote a few

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (October 16, 1907), Vol. I, pp. 247–391.

This report was laid before the First Commission in the name of a committee composed of, first, the officers of the commission: their Excellencies Messrs. Barbosa, Merey de Kapos-Mère, Sir Edward Fry, honorary presidents; his Excellency M. Léon Bourgeois, president; his Excellency M. Esteva, M. Kriege, and his Excellency M. Pompilj, vice presidents; Mr. Scott, reporter; and as having been designated by the subcommission, his Excellency Baron Marschall von Bieberstein (Germany), his Excellency Mr. Choate (United States of America), M. Lammasch (Austria-Hungary), his Excellency Baron Guillaume (Belgium), Baron d'Estournelles de Constant (France), M. Louis Renault (France), M. Fromageot (France), M. George Streit (Greece), M. Guido Fusinato (Italy), their Excellencies Messrs. Eyschen (Luxemburg), Asser (Holland), Candamo (Peru), d'Oliveira (Portugal), Beldiman (Roumania), and de Martens (Russia).

[2] On October 16, 1907, the conference adopted the project for the creation of a court of arbitral justice, and recommended its establishment through diplomatic channels by a vote of thirty-nine for, five abstentions (Belgium, Roumania, Sweden, Switzerland, and Venezuela), and none against.

paragraphs, by way of introduction, to the Permanent Court of Arbitration, created in 1899, by the First Conference, alongside of which it is proposed to establish a court of arbitral justice, in order to supplement the existing court.

It will be recalled that Article 16 of the convention of 1899 provided that

> in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

That this solemn declaration of a broad and beneficent principle might not remain a dead letter, the conference undertook to create a court in which international conflicts might be arbitrated. Article 20 provides as follows:

> With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory powers undertake to organize a permanent court of arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention.

The framers of the convention had in mind the arbitration of international conflicts, and, admitting as incidental to arbitration that the parties litigant choose their own judges,[1] Article 17 added that "the arbitration convention is concluded for questions already existing or for questions which may arise eventually. It may embrace any dispute or only disputes of a certain category."

If Articles 16, 20, and 17 be compared and analyzed, it is evident that questions of a judicial nature were deemed peculiarly susceptible of arbitration, and by the establishment of a permanent court of arbitration it was hoped that these questions would be frequently arbitrated and decided on the basis of respect for law. So far it would seem that the foundations were laid for a court in the judicial sense of the word, but arbiters, the choice of the parties litigant, instead of judges were to be appointed.

Inasmuch, however, as the Permanent Court was declared by Article 21 to be "competent for all arbitration cases," it is manifest that the framers of the convention contemplated that questions other than

[1] Article 15.

those of a judicial nature might be submitted to the Permanent Court. There was thus created a single institution which might decide purely legal questions on the basis of respect for law, and broader questions of a nonjudicial nature, either or both of which were to be decided by judges, that is arbiters, chosen by the parties in controversy.

In modern states judicial questions are decided by judges in courts of justice, and the judges are not the direct appointees of the parties. In matters of purely private interest which may be compromised, judges of the parties' choice are as much in place as they would be out of place in a court of justice.

The difference between judicial and nonjudicial questions, and the procedure applicable to each, was outlined by his Excellency M. Bourgeois before the First Commission. Replying to the criticisms of their Excellencies Mr. Choate and M. Asser upon the shortcomings and defects of the Permanent Court of 1899, he said:

> If there are not at present judges at The Hague, it is because the conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the court created in 1899 lose its essentially arbitral character, and we intend to preserve this freedom in the choice of judges in all cases where no other rule is provided.
>
> In controversies of a political nature especially, we think that this will always be the real rule of arbitration, and that no nation, large or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.
>
> But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? . . . And does not every one realize that a real court composed of real jurists may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?
>
> In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional, and experience will show the advantages or disadvantages of the two systems.

Impressed by the justice of these views, the framers of the present project have had primarily in mind the establishment of a court for the determination of questions of a judicial nature, without, however, depriving the powers of the right to resort to it for the settlement of differences of another character. Their aim and purpose is to carry

the work of 1899 a step further by instituting a court of arbitral justice for the judicial decision of international controversies.

Article 20, previously quoted, looked to a permanent court, but it is common knowledge that the court is not permanent, for it exists only for the special case and has to be created anew for each case submitted. There is indeed a permanent list from which the judges can be and indeed must be chosen for the particular case. The framers of the convention meant the court to be accessible at all times to the suitors, and it was established in order to facilitate recourse to arbitration. This excellent end was frustrated by faulty machinery, because an unconstituted court cannot be said to be accessible at any time, much less at all times. As stated by his Excellency M. Asser, a founder and friend of the court, "It is difficult, time consuming, and expensive to set it in motion."

And in the same connection his Excellency Mr. Choate said:

One cannot read the debates which ushered in the taking of the great step by the First Conference without realizing that it was undertaken by that body as a new experiment, and not without apprehension, but with an earnest hope that it would serve as a basis, at least, of further advanced work in the same direction by a future conference. The project was as simple as the purpose of it was grand, but, as M. Asser has well said in his eloquent speech, "it created a court in name only by furnishing a list of jurists and other men of skill in international law, from whom the parties to each litigation might select judges to determine the case, who should sit at The Hague according to machinery provided for the purpose and proceed by certain prescribed methods, if no others were agreed upon by the parties. . . ."

We do not err in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, and to draw to the Hague Tribunal for decision any great part of the arbitrations that have been agreed upon; and that in the eight years of its existence only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of the court, at least two thirds have not as yet been called upon for any service. It is not easy, or perhaps desirable, at this stage of the discussion to analyze all the causes of the failure of a general or frequent resort by the nations to the Hague Tribunal, but a few of them are so obvious that they may be properly suggested. Certainly it was for no lack of adequate and competent and distinguished judges, for the services they have performed in the four cases which they have considered have been of the highest character, and it is out of these very judges that we propose to constitute our new court.

I am inclined to think that one of the causes which has prevented a more frequent resort of nations to the Hague Tribunal, especially in cases of ordinary or

minor importance, has been the expensiveness of a case brought there, and it should be one element of reform that the expense of the court itself, including the salaries of the judges, shall be borne at common expense of all the signatory powers, so as to furnish to the suitors a court at least free of expense to them, as is the case with suitors of all nations in their national courts.

The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law, or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact, it has thus far been a court only in name, a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good so far as it has been permitted to work at all, but our effort should be to try and make it a medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

Let us, then, seek to develop out of it a permanent court which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval, and regulate the conduct of the nations. By such a step in advance we shall justify the confidence which has been placed in us, and shall make the work of this Second Conference worthy of comparison with that of the conference of 1899.

The court outlined by the project is meant to realize the views of the framers of 1899; it is a court in essence and in fact, composed of actual and prospective judges, and it is permanent because in existence and in session.

In thus calling attention to some of the palpable defects of the convention of 1899 no attempt is made to belittle the Permanent Court, which is a landmark in the development of international arbitration. Eight years have now passed since the creation of the Permanent Court of Arbitration, and the court has been called into being four times. The institution has been tested and has stood the test, and we are able to view the court in the light of experience. Now this experience shows that the theory of 1899 was correct, and that the institution created is workable but expensive; it likewise shows that it may be improved, and that the great improvement consists in making the court, in fact as in theory, permanent. The most eloquent testimony to the necessity

of this improvement is the fact that a founder and friend, and the most experienced and authoritative of living arbiters, his Excellency M. de Martens, presented in the very first days of the conference a project for the permanence of a judicial committee to be selected from the present court.

If the very father can lay hands upon the child and suggest that he mend his ways, it is not to be wondered at that the godfather should speak more boldly.

The United States of America has always favored international arbitration, in theory as in practice, as the heavy volumes of Moore's *International Arbitrations to which the United States has been a Party* amply show. In 1899 the American delegation cooperated earnestly, shoulder to shoulder, with the British and Russian delegations in the creation of the present Permanent Court, and it has appeared as plaintiff in two of the four cases tried before it. As the United States was reasonably successful in each case, it cannot be said that it is a defeated litigant that suggests changes and improvements of a fundamental nature. The experience of the United States with its Supreme Court leads it to believe that a court of arbitral justice can be created to decide international disputes between equal and sovereign states of the family of nations, just as surely and truly as the Supreme Court decides disputes of an international character between the states of the American Union.

The United States has always believed and said that the court of 1899 is the first step to a permanent court of arbitral justice, and in so saying it merely consults its own recent past. It may not be known generally that the United States instituted a court of arbitration a hundred and thirty years ago, during its War of Independence. The thirteen equal sovereign states, then at war with Great Britain, organized a temporary and loose confederation. In the fundamental and constitutional act, called the Articles of Confederation, arbitration of international difficulties between the states was established in principle and in fact in the following manner.

Congress was to be the last resort in controversies between the states over boundaries, questions of jurisdiction, and other matters. When the authorities or authorized agents of a state petitioned Congress to settle a dispute or difference, notice of the fact was given to the other state in controversy and a day set for the appearance of the

two parties by their agents, who were thereupon directed to appoint members of the tribunal by common consent. Failing an understanding, Congress designated three citizens of each of the states of the Union, and from the list thus formed each party, beginning with the defendant, struck alternately a name until only thirteen remained. From these thirteen, seven or nine were drawn by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of nonappearance of one of the parties without a valid reason, or refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in his stead. The award was final in all cases, and each state pledged itself to carry out the award in good faith. The judges were required to take an oath before one of the judges of the Supreme or Superior Court of the state in which the tribunal sat, that they would perform their duties carefully and without partiality or desire for gain.

Even a superficial examination of these provisions shows the striking likeness between the court at The Hague and its American predecessor and prototype.

The history of the American court of arbitration is quickly told: it failed to justify its existence, and, lacking the essential elements of a court of justice, it was superseded within ten years of its creation by the present Supreme Court, in which controversies which might lead to war, if between sovereign states, are settled by judicial means.[1]

Will history repeat itself? Conscious of the weakness and defects of the American court of arbitration, and recognizing the admirable results of the judicial settlement of international controversies by a permanent court composed of judges, the American delegation presented a project for the establishment of a really permanent court, composed of learned and experienced judges, open to all the signatory powers without the delays and formality necessarily involved in the organization for each case of a special tribunal.

Passing from considerations of a general nature to the actual proceedings in the conference, the First Subcommission of the First Commission found itself confronted, at the session of August 1, 1907, with two propositions looking to the permanency of the international

[1] Missouri *v.* Illinois, 200 U. S., 496, 518 (1905).

court. The first was a Russian project, the second the original project of the American delegation.

The discussion that took place on August 1 and on August 3 was of a general nature, and dealt with the question whether the establishment of a permanent court composed of judges, ready to receive and decide cases submitted to them, was in itself desirable in present conditions.

At the session of August 1 his Excellency Mr. Choate unfolded and explained the American project. He began by quoting the following passage from President Roosevelt's letter of April 5, 1907, to Mr. Carnegie, read at the Peace Congress held at New York:

> I hope to see adopted a general arbitration treaty among the nations, and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries, so as to make it increasingly probable that in each case that may come before them they will decide between the nations, great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at The Hague, but it seems to me that this of a general arbitration treaty is perhaps the most important.

His Excellency Mr. Choate then stated that the instructions to the American delegation were

> to secure, if possible, a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. . . .
>
> We have not, in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the president to consider them.
>
> The plan proposed by us does not in the least depart from the voluntary character of the court already established. No nation can be compelled or constrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods and to avoid the terrible consequences and chances of war.
>
> In the first article of our project we suggest that such a permanent court of arbitration ought to be constituted, — and that is the great question of principle to be first decided. And to that end we submit that it should be composed of not more than seventeen judges, of whom nine should be a quorum, men who had enjoyed the highest moral consideration and a recognized competence in questions of international law; that they shall be designated and elected by the nations, but in a way prescribed by this entire conference, so that all the nations, great and

small, shall have a voice in designating the manner of their choice; and that they shall be chosen from so many different countries as fairly to represent all the different systems of existing law and procedure, all the principal languages of the world, all the great human interests, and a widely distributed geographical character; that they shall be named for a certain number of years, to be decided by the conference, and shall hold their offices until their respective successors, to be chosen as the conference shall prescribe, shall have accepted and qualified.

Our second article provides that our Permanent Court shall sit annually at The Hague upon a specified date, the same date in each year, to be fixed by the conference, and that they shall remain in session as long as the necessity of the business that shall come before them may require; that they shall appoint their own officers and, except as this or the succeeding conference prescribes, shall regulate their own procedure; that every decision of the court shall be by a majority of voices, and that nine members shall constitute a quorum, although this number is subject to the decision of the conference.

We desire that the judges shall be of equal rank, shall enjoy diplomatic immunity, and shall receive a salary, to be paid out of the common purse of the nations, sufficient to justify them in devoting to the consideration of the business of the court all the time that shall be necessary.

By the third article we express our preference that in no case, unless the parties otherwise agree, shall any judge of the court take part in the consideration or decision of any matter coming before the court to which his own nation shall be a party. In other words, we would have it in all respects strictly a court of justice and not partake in the least of the nature of a joint commission.

By the fourth article we would make the jurisdiction of this Permanent Court large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign states, which they had not been able to settle by diplomatic methods, and which shall be submitted to it by an agreement of the parties; that it shall have not only original jurisdiction, but that room shall be given to it to entertain appeals, if it should be thought advisable, from other tribunals, and to determine the relative rights, duties, or obligations arising out of the sentences or decrees of commissions of inquiry or specially constituted tribunals of arbitration.

Our fifth article provides that the judges of the court shall be competent to act as judges upon commissions of inquiry or special arbitration tribunals, but in that case, of course, not to sit in review of their own decisions, and that the court shall have power to entertain and dispose of any international controversy that shall be submitted to it by the powers.

And finally, by Article 6, that its membership shall be made up, as far as possible, out of the membership of the existing court, from those judges who have been or shall be named by the parties now constituting the present conference, in conformity with the rules which this conference shall finally prescribe.

His Excellency M. de Martens, who, as has already been said, was a founder and friend of the Permanent Court of Arbitration, thereupon

pronounced a remarkable discourse, showing, in the first place, that under the terms of the programme for the conference the creation of a permanent court was permissible, and giving to the idea of permanence the support that comes from theoretical and practical experience in international arbitration.

We are agreed upon one essential and indisputable fact, namely, that the present Permanent Court is not organized as it should be. An improvement is needed, and it is our task to make it. This task is an important one, indeed the most important one, in my opinion, of all those devolving upon us.

I have under my eyes the Russian circular of April 3, 1906, which contains the programme adopted by all the powers. It speaks, first of all, of the necessity of perfecting the principal creation of the conference of 1899, that is, the Permanent Court. The First Conference departed with the conviction that its task would be completed subsequently as a result of the steady progress of enlightenment among peoples, and as the results of acquired experience manifested themselves. Its most important creation, the International Court of Arbitration, is an institution which has already been tested and which has grouped together for the general welfare, as in an Areopagus, jurists enjoying universal respect.[1]

It thus appears that his Excellency M. de Martens realized the deficiencies in the work of 1899. "The court of 1899 is but an idea which occasionally assumes shape and then again disappears." The realization of these defects induced the Russian delegation to present a project, but it did not by any means offer its project as the sole basis of the deliberations. The project in the first place sanctions the absolute choice of the arbitrators by the powers. The idea of the list is retained, but, considering that the arbitrators composing it should be known to each other and be at least in part at the disposal of the nations, M. de Martens suggested the idea of periodical meetings, during which the members should select a permanent tribunal of arbitration to be always at the disposal of the powers which might desire to have recourse to it.

This Permanent Court was to be composed of three members, but the number of judges could be increased at any time. Instead of three members, five, seven, or nine could be elected. This is, however, a question of detail.

The advantage of the Russian project consists in the retention of the present foundations, on which it proposes to construct another edifice better adapted to the just demands of international life.

[1] Mr. Scott thereupon explained technically and in detail the principles upon which a permanent court should be based.

For the text of Mr. Scott's address, see pages 84–97 of the present volume.

His Excellency Baron Marschall von Bieberstein pledged in brief but eloquent terms the support of the German delegation:

I declared a few days ago that the German government considers the establishment of a permanent court of arbitration as a real step in the line of progress.

I wish now, while this discussion is being opened, formally to repeat my declaration in the name of the German delegation. I take a genuine pleasure in accepting the general principles so eloquently defended by the delegates from the United States.

We are ready to devote all our energy toward the accomplishment of this task which M. de Martens very correctly defined, on presenting it, as one of the most important ones of the Second Peace Conference.[1]

His Excellency Sir Edward Fry gave to the idea the support of the British delegation, and their Excellencies Messrs. de la Barra, on behalf of Mexico; and Larreta, Drago, and Saenz Peña, First Delegate from Argentina, stated that their delegations were in favor of the idea of permanency. At the following session their Excellencies Messrs. Esteva, First Delegate from Mexico; Milovanovitch, in the name of the Servian delegation; Belisario Porras, delegate from the republic of Panama; J. N. Léger, delegate from Haiti; José Gil Fortoul, delegate from Venezuela; Ivan Karandjouloff, delegate from Bulgaria; the Marquis de Soveral, in behalf of Portugal; Samad Khan Momtas-es-Saltaneh, in behalf of Persia; and J. P. Castro, in behalf of Uruguay, — stated that they agreed to the general outlines of the American project, some without reservation and others making reservations regarding the composition of the court. His Excellency M. Esteva, in particular, maintained that he voted only with reservations,

because the principles which are to serve as a basis in the establishment of the Permanent Court were of such great importance that the Mexican delegation would not give its final vote until it had learned of the various projects for the organization of the court.

In the session of the third of August, his Excellency Mr. Choate repeated what he had previously said in his discourse, that the proposed court was not to be obligatory, that it was not to supplant the Permanent Court of 1899, and that each litigant should have the free and untrammeled right to choose which of the two institutions he preferred.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 1st Subcommission, 9th session, August 1, 1907), Vol. II, p. 323.

Whereupon his Excellency M. Beernaert, of Belgium, delivered a long and careful address in which he replied to the arguments in favor of the proposed court, and expressed his profound and earnest conviction that the line of progress was in the direction of 1899, that the institution of 1899 was preferable to the proposed one, and that the new court with permanent judges imposed upon the litigants would destroy the principle of selection which is the essence of arbitration.

His Excellency Sir Edward Fry replied briefly to the remarkable oration of M. Beernaert and stated in a few short sentences the problem before the commission:

If it were a question of supplanting the present Permanent Court by a new court to be created, I should without hesitancy side with his Excellency M. Beernaert, but the American scheme proposes the creation of a new court *in addition* to the present court. The two courts will work together toward the same goal, and the one which appears to answer the needs of the nations best will survive.

The choice will be free to the nations, and it is very certain that the most effective court will be chosen.

The discussion was practically closed by the eloquent and unanswerable discourse of his Excellency M. Léon Bourgeois, who spoke not as president of the commission, but as First Delegate of France, distinguishing between the Permanent Court of Arbitration of 1899 and the proposed court, showing conclusively that each would have its separate and distinct sphere of interest and influence, and that the existence of the two courts would be a double guarantee for the world's progress towards justice and peace.

What we must ascertain is whether, for limited purposes and under special conditions, it is not possible to secure the working of arbitration more quickly and easily under a new form in no way incompatible with the first form.

For questions of a purely legal nature a real court composed of jurists should be considered as the most competent organ. . . . It is therefore either the old or the new system that is to be preferred, according to the nature of the cases.

Thus we see before us as two distinct domains: that of permanency and that of compulsion. However, we reach the same conclusions in both domains.

In the domain of universal arbitration there is a zone of possible compulsion and a zone of necessary option. There is a vast number of political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration.

Likewise, in the domain of permanency, there are cases whose nature is such as to permit and perhaps to warrant their submission to a permanent tribunal.

However, there are others for which the system of 1899 remains necessary, for it alone can give the nations the confidence and security without which they will not appear before arbitrators.

Thus it is seen that the cases for which the Permanent Tribunal is possible are the same as those in which compulsory arbitration is acceptable, being, generally speaking, cases of a legal nature. Whereas political cases, in which the nations should be allowed freedom to resort to arbitration, are the very ones in which arbitrators are necessary rather than judges, that is, arbitrators chosen at the time the controversy arises.[1]

The president having thereupon submitted the American proposition to a vote, twenty-eight votes were cast in favor of taking into consideration the establishment of a permanent court of arbitration, and twelve states refraining from voting.[2]

The American and Russian propositions were then referred to the Committee of Examination for the elaboration of a project.

The Committee of Examination was therefore confronted by two projects at its first meeting on August 13, 1907. The Russian project was not discussed. The American project served as a basis for discussion, but it is useless to consider it in detail, for it was withdrawn in favor of a common project of the German, American, and English delegations. Later, at the third meeting on August 29, his Excellency M. Barbosa, First Delegate from Brazil, presented a project which he accompanied by a powerful and detailed address. This project was, however, afterwards withdrawn by his Excellency M. Barbosa. Propositions from the Bulgarian, Haitian, and Uruguayan delegations regarding the composition of a permanent court were also presented.

Upon the presentation of the project of the three delegations of Germany, the United States, and Great Britain, for the organization of a permanent court, an animated discussion arose as to the name which the court, if established, should bear. For it was felt that, wittingly or unwittingly, the name chosen either would or should express the nature of the institution to be created, and distinguish it clearly from the existing court.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents* (1st Commission, 10th session, August 3, 1908), Vol. II, pp. 347–349.

[2] Those voting in favor of the motion were Germany, United States, Argentina, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, France, Great Britain, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Russia, Salvador, Uruguay, Venezuela. Those refraining were Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Servia, Siam, Sweden, Switzerland, Turkey. Ibid., p. 350.

The name chosen in the first draft was the High International Court of Justice, the intention of the authors of the project being to indicate that the court was to be an international court and that its purpose should be to decide any and all claims submitted to it under a sense of that judicial responsibility which is supposed peculiarly to exist in courts of justice. It was objected that the expression "high court" indicated the existence of lower courts, and that therefore the term "high court" in itself either included or presupposed inferior courts from which an appeal might be taken. It was suggested by the Austro-Hungarian delegation that, in such a case, a misunderstanding might arise, for instead of being a court of first instance, depending upon the voluntary submission of the parties to a controversy, the expression "high court" might seem to be synonymous with a court of cassation. The British delegation explained that the term "high court" as understood in Great Britain did not imply necessarily the idea of a court of appeal, but is also used to designate a court of first instance for certain cases of great importance.

Another objection made to the terminology was the use of the word "justice," because, if unqualified, it would seem or might seem that the court to be created was a law court in the strict judicial sense rather than a court of arbitration. The Austro-Hungarian delegation therefore proposed that the title should show clearly the arbitral nature of the court.

His Excellency M. Barbosa felt that the unqualified presence of the word "justice" would not only give rise to a misunderstanding, but would be a mistake, because it would mean that the administration of justice was to be the sole purpose of the court, whereas, as a matter of fact, the purpose in mind was the administration of arbitral justice.

His Excellency Mr. Choate, speaking for the authors of the project, expressed a willingness to accept the title most satisfactory to the committee. "We leave," he said, "the christening of the child to the committee. Once christened, the child's success in life depends on its acts, not on its name." To this President Bourgeois replied: "The question is not merely one of name, but rather of sex. In any event the committee is unanimously of the opinion that the new institution should not be vested with the attributes of a court of appeal."

The authors of the project, taking note of the desire of the committee, proposed in second reading the title "International Court of

Justice," but, yielding to the general desire of the committee, finally accepted the "Court of Arbitral Justice" as the one most likely to indicate at once the nature and scope of the proposed institution.

Having ascertained the name of the court, we can now pass in review the articles which explain its nature and functions.

The Project for the Establishment of a Court of Arbitral Justice

Article I. With a view to promoting the cause of arbitration, the contracting powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a judicial arbitration court, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of insuring continuity in jurisprudence of arbitration.

An attentive examination of the first article of the project shows the reason for the creation of the court, namely, first, "to promote the cause of arbitration," and second, to assure "the continuity of arbitral jurisprudence." In order to attain these desirable ends, the authors of the project considered as indispensable a court in permanence, as distinct from a court to be constituted for a particular occasion, access to which should be free and easy, and which, by embracing in its composition the different judicial systems of the world, would be fitted to ascertain and develop a system of international law based upon a large and liberal spirit of equity in touch with the needs of the world. For, although we speak of international law as an international system, it is common knowledge that the system of international law as understood and applied in any community is unfortunately insensibly influenced by national feeling or prejudice, much as the stream is colored by the stratum over which it flows. For this national interpretation it was sought, by means of the court, to substitute an international interpretation, and by a series of decisions based upon each other and pervaded by a sense of justice it would seem no vain hope that the institution so created would not only develop but, in the course of time, create by judicial means a system of jurisprudence truly international. In the absence of distinct legislation it must always be a question open to discussion, how far a tribunal is bound by previous or existing decisions. The difficulty becomes infinitely greater when isolated tribunals of arbitration pass upon the same or allied questions without the sense of responsibility which comes from a previous decision of

the same tribunal. By the establishment of a court of arbitral justice it may be hoped, indeed expected, that a court sitting in permanence will not lightly overrule or deviate from previous decisions unless there be overwhelming and compelling reasons; and it is also clear that a court, knowing that its decision is likely to be authority with its successor and cited as a precedent, will devote the labor and reflection to the decision necessary to make it a landmark in international law. The twofold purpose, namely, "to advance the cause of arbitration" and to assure "the continuity of arbitral jurisprudence," would seem to demand a permanent court, and the permanence of the court would insensibly and inevitably assure not merely the continuous but the scientific development of arbitral jurisprudence.

To effectuate the fundamental purpose of the court it is not alone sufficient that it be permanent, although permanency is indeed a first requisite. If the court is to develop an international, not a national, system of law, it seems to need no argument that the various systems of law should find representation within the court and upon its bench. In a national court this proposition is so axiomatic that it would neither be questioned nor discussed, but the problem is here complicated by the fact that many systems of law exist and that these various systems must find adequate representation. Different systems of law exist in different states, but an international court must embrace the various systems of the world. If the court is to judge according to equity and international law, it must not be the equity of any one system, but the equity which is the resultant of the various systems of law. Just as the individual rarely frees himself from his environment, so the jurist is influenced by his system of law and the training in it. Supposing, therefore, that each is influenced by his training, it is necessary to have judges trained in the various systems of law in order that the equity administered by the court may be truly the spirit of the laws. For the purpose of the court municipal law must be internationalized. In this case, and in this case only, can the judgment be equitable in any international sense, for the judgment so formed will be based upon international equity as well as international law.

It is stated that the jurist is the product of his training. It is likewise true that the individual is influenced by his environment and possesses, in greater or lesser degree, the characteristics of his nation. It would be futile, if indeed it were possible, to denationalize a judge.

But the presence in the court of judges trained in the various systems of law, and representing in their intellectual development characteristics of their respective nations, would go far toward engendering an international spirit.

But even admitting the presence of the various prerequisites for a court of arbitral justice, it is necessary that the access to the court be easy, indeed that it be free, otherwise the difficulties of the Permanent Court of 1899 arise. It is not sufficient that the door may be opened. It will not do that the door be opened with difficulty. It must not be forced; it must yield readily to the touch of plaintiff or defendant. In the interest of justice and of the peaceful settlement of international difficulties it should be open. It should invite, not discourage, attendance, and therefore burdensome conditions should not exist. The access should be free and easy; free in the sense that no fee should be paid for entrance, and easy in that the desire to enter should of itself be sufficient. It therefore seemed indispensable to the authors of the project that preliminary expenses should not be required, and that the expenses of the court, including therein the salaries of the judges, should be borne by the signatory powers, not by the individual suitors; for expenses incurred in the interest of all should be shared by all.

The original draft expressed this thought by the phrase "easy and gratuitous access." As, however, the word "gratuitous "seemed ambiguous, it was suggested by his Excellency M. de Martens that a phrase be chosen which gives full expression to the thought intended to be conveyed; and as only the expenses of the court were to be borne by the community, and as each litigant was to bear its own expense and an equal share of the costs in the case, it was suggested that the expression "free and easy" would be less misleading and therefore more accurate. The suggestion of M. de Martens was accepted and incorporated in the text adopted by the committee.

Admitting the court of arbitral justice to be necessary or advantageous, the question naturally arises, What should be the relation between the proposed court and the existing Permanent Court of Arbitration created by the convention of 1899. Were the court intended as a substitute for the Permanent Court, the question would be one of no great importance, but as the authors of the project disclaimed expressly any intention to displace or indeed modify the creation of 1899,

it was necessary that this intent should find adequate expression. It would be possible to organize a new court without mentioning the old, so that the two institutions, each meant for a different purpose, would coexist. A matter of such fundamental importance should not, however, be left to implication, and the authors of the project expressed the idea clearly and precisely in the words "that the new court should be organized and exist alongside the Permanent Court of Arbitration." As, however, the expression "by the side of the Permanent Court" might seem to reflect upon the older and existing institution, it was decided, upon the motion of his Excellency M. de Merey, that the text of Article 1 should state, in definite terms, that the new court presupposes the existence of the old, and that the old court was to be in no wise jeopardized by the creation of the new. M. de Merey therefore proposed to replace the expression "alongside the Permanent Court" by the phrase "maintaining, however, the actual court," which wording would seem to indicate more clearly the maintenance of the older institution and its connection with the new court. In consequence of this suggestion the principle advocated by M. de Merey was accepted and strengthened in the following manner, namely, "without altering the status of the Permanent Court of Arbitration"; for the latter expression includes not merely the desire to maintain the court of 1899, but states positively that the new court shall not injure or alter the Permanent Court of Arbitration. This wording proposed by the authors of the project was accepted by the committee and incorporated in the final text.

But supposing that the new institution be created and exist alongside the other, without altering its status, the question is still unanswered, namely, What is the relation between the court of 1899 and the new institution? Various views were expressed on the subject. One view would make the new court a committee of the older court, but constitute it within the Permanent Court. Another view, differing but slightly from the former, would make it independent in name, but by appointing its judges from the members of the Permanent Court of Arbitration would, in reality, make it a development of the existing court. Still another view would recognize the independence of the institution by placing it alongside the Permanent Court as an independent institution, but would establish a close connection between the two by appointing its judges, as far as possible, from among the

members of the original court. As will be seen, the last view was the one accepted by the committee.

ARTICLE 2. The judicial arbitration court is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the court are appointed, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present convention.

It will be seen that this article is composed of three paragraphs dealing respectively, first, with the qualifications of the judges; second, with their nomination; and third, with the time within which the nomination shall be made. Let us consider each in its proper order.

It cannot be denied that the respect for a court of justice depends upon the character and attainments of its judges; and every community, with even a rudimentary respect for justice, must see to it that the bench, like Cæsar's wife, be above suspicion. The method of selection may vary according to time, place, and circumstance. The judge may be appointed by the sovereign power or he may be elected by popular vote; in any case he must possess the qualities which not only inspire but command respect.

The convention of 1899 prescribed that the persons chosen for arbitrators should be "of known competency in questions of international law," and that they should, in addition, enjoy "the highest moral reputation" (Article 23).

It seemed unnecessary to the authors of the present project to state that the judges should possess this moral character; because it is impossible to suppose that the signatory powers would select any who did not possess this character in the highest degree. But in order that it might not seem to have escaped attention, and for the sake of completeness, the requirement was borrowed from the convention of 1899 and incorporated in the final wording of the article. That "recognized competence in matters of international law" should be made an essential qualification requires no explanation, for the purpose of the court would be frustrated should the judges be inexperienced in international law. The requirements of 1899 were therefore retained, although in modified form.

The additional requirements stipulated in the present project arise from the very nature of the institution; for, as his Excellency M. Léon Bourgeois pointed out, in his powerful and convincing argument before the First Subcommission, the Permanent Court of 1899 was fitted to subserve a twofold purpose, namely, the decision of political and of judicial questions. As the present court is preeminently destined, as indicated by its name and its nature, to decide judicial questions and to act as a court of arbitral justice, it seemed necessary to require that its judges should possess the qualifications for judges in their respective countries; otherwise they might not bring to the court that knowledge of their judicial systems so essential to the successful operation of an international tribunal. In the next place, it was hoped that judges might be selected for the new court who had had experience in developing and interpreting the judicial systems of their respective countries. Therefore it was provided that the judges and deputy judges for the new court should possess the qualifications for appointment to the highest courts of their respective nations.

The fundamental purpose of the authors of the project was clearly and succinctly expressed by Dr. Kriege in the following language:

> There are certain states in which eligibility to the various judicial offices is governed by requirements of various kinds and degrees. If we should not require that an international judge possess all of the judicial qualifications required of the justices of the supreme court of his own country, if we should confine ourselves to prescribing that the judge fulfill the conditions required for appointment to a judicial office, it would, theoretically, be possible to send to the court persons who do not possess the competence without which its important duties cannot be performed. In some countries, for instance, persons who have not even read law may be appointed to the office of justice of the peace. It is obvious that such a magistrate should not sit on an international bench.

But foreseeing the possibility that the greatest authorities upon the subject of international law might not have filled judicial posts in their respective countries, or indeed might not in some cases possess the requirements for admission to the supreme court in their respective countries, the authors of the project provided that "jurists of recognized competence in matters of international law" should be eligible. The purpose was not to exclude a competent authority by limiting the range of selection, but to open the court to all who possessed the qualifications, accentuating, as far as possible, judicial experience.

The authors of the project could not overlook the fact that the most competent authorities in international matters are often to be found in our universities and schools of learning.

The purpose, as thus clearly outlined in the first paragraph, is to obtain a body of jurists trained in the municipal law of the various countries, and familiar, practically as well as theoretically, with the details and intricacies of international law as it has been slowly developed in centuries of conflict and assumed a definite and systematic shape. It is freely admitted that no method of selection, and that no qualifications, however rigid, will infallibly produce the jurist. In the last resort the man is superior to any qualifications, and the excellence of the court must depend upon the character and personal force of the judges selected rather than upon academic and artificial distinctions.

The second paragraph of Article 2 deals with the selection of persons who possess the qualifications for judges, and in this connection the committee took occasion to express fully and in detail the relation that should exist between the Permanent Court of Arbitration and the new court.

His Excellency M. Barbosa declared that the expression that the judges should be chosen, as far as possible, from the members of the Permanent Court failed to establish any legal liability to do so, and that rather than seem to create an obligation where none existed, it would be better to say that the signatory powers might choose the judges and deputy judges from the members of the Permanent Court.

It might well happen, however, that none of the judges of the present court could accept a permanent appointment, either because they were otherwise engaged at home or because they might be unwilling to pledge themselves to reside permanently or frequently at The Hague. His Excellency M. Asser thought the objection might be met by permitting each state to appoint an additional judge, making the number of judges appointed by each state for the actual court five instead of four, to which his Excellency Mr. Choate replied that the addition of an extra judge would increase a list already large. His Excellency Baron Marschall von Bieberstein felt that the choice among the members of the court of 1899 should be the rule, whereas President Bourgeois preferred that the judges of the new court should be chosen from among and by the members of the court of 1899. He subsequently proposed that the rule of appointment suggested by

Baron Marschall be adopted in principle, and that in default of suitable members in the Permanent Court the signatory powers might then be free to look beyond the members of the present court. Baron Marschall suggested that, on the whole, the method announced in the second article should be retained, and the matter was referred to the drafting committee to consider and report a final text. The committee after mature reflection preferred the original text, and as such it was ultimately adopted.

In this way the committee indicated very clearly its desire that the Permanent Court of Arbitration should remain in existence, that it should furnish, as far as practicable, the judges for the new court, and that the signatory powers should appoint judges and deputy judges from the members of the present court as far as circumstances would permit. Of these circumstances the signatory powers, as sovereign states, naturally would be the proper and exclusive judges. While, therefore, the proposed court would be independent, as indicated in the first article, it would nevertheless derive in large measure its strength, substance, and influence from the institution of 1899.

In the plenary session of the First Commission on Thursday, the tenth of October, the wording of the paragraph was slightly modified upon the motion of his Excellency M. de Hammarskjold, First Delegate of Sweden, so as to bring it into greater harmony with the provisional character of the text, which presupposes for its application an agreement of the nations upon the method of selecting the judges. The word "choice" was substituted for "nomination," and the phrase "signatory powers" was omitted. In this form the article is more accurate, although its meaning remains unchanged.

The last paragraph in Article 2 is purely formal in its nature. It neither gave rise to discussion in the committee nor does it need explanation in the report, for it provides merely that the judges shall be nominated within the six months following the ratification of the present convention.

ARTICLE 3. The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the administrative council created by the Convention for the Pacific Settlement of International Disputes. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case the appointment is made for a fresh period of twelve years.

Article 3 commended itself generally to the Committee of Examination, for both in the first and second reading of the project it was adopted without comment or observation.

It appears, therefore, that the judges of the court are nominated for a certain term and that they are reëligible. The fundamental idea underlying this provision was to secure regularity and continuity of judicial decision, for it was thought advisable, indeed essential, that the international community should have the benefit of the experience acquired by a judge upon the bench. Article 2 provides that the judge at the moment of his appointment should possess judicial qualifications, including a profound knowledge of international law. He thus brings to the court weight and character, and the length of his service upon the court cannot fail to add greatly to his native and acquired attainments.

The provision for the reappointment of the judge aimed to establish another guarantee for the continuity of judicial decision as well as the permanence of the court itself.

In the next place it is necessary that the appointment of the judge be notified in some way to an international body, and it was thought advisable to notify each individual appointment to the administrative council instituted by the Convention of July 29, 1899, for the Pacific Settlement of International Disputes. The council was designated for this purpose because it is composed of the diplomatic representatives of the signatory powers, and it was felt that the appointment of the judge, in itself a high international act, should be communicated to the representatives of the nations rather than to the international bureau, which possesses clerical instead of diplomatic standing.

The second paragraph of Article 3 deals with the filling of a vacancy, whether caused by the death or resignation of the judge. It will not escape your notice that the provision of this article is borrowed from Articles 23 and 35 of the convention of 1899. It has nothing to do with the causes of the vacancy, which may lead to much controversy and give rise to differences of opinion. It simply provides that the vacancy, however created, should be treated as an original vacancy, and that the judge should be appointed in the manner provided for in the first paragraph as in the case of an original appointment. It necessarily follows, therefore, that the appointment to fill a vacancy should be for the full term of twelve years.

The question arose frequently in committee, and was carefully examined, whether a provision should not be inserted in the project guaranteeing the immovability of the judges. The Committee of Examination gave the matter earnest consideration, and came to the conclusion that it was unwise to give fuller expression to the doctrine of immovability or to attempt to define in advance the causes which might lead to the removal of judges. It was suggested that the legislative dispositions of the signatory powers might be taken as a guide, but as these are so various it seemed impossible to reconcile them and state the result in a single clause.

The authors of the project considered that fixing the mandate of the judge at a period of twelve years was in itself a sufficient guarantee against arbitrary revocation, and that the exercise of the right of recall or dismission should be left to the good sense as well as to the good faith of the various governments. The nomination for a period of twelve years and the provision for a new appointment in vacancies arising from the death or resignation of the judge in reality establish the principle of immovability.

Should a government recall its judge and appoint another in his stead, the appointment would nevertheless be valid, because upon taking oath as judge he is entitled to participate in the decision of the cases, and the judgment in which he takes part would likewise be valid and binding. Although the matter seems free from doubt, nevertheless, upon the suggestion of President Bourgeois, the conclusion of the authors of the project upon the validity of a judgment rendered in such circumstances is specifically stated in the report, lest future interpretation or controversy might question the jurisprudence which the court is called upon to develop.

It was proposed to include in the general term of "unworthiness" all grounds of dismissal, but the difficulty then presented itself as to who should be the judge of this question. No positive provision is therefore inserted in the project on this subject, and the case is left to be decided when and as it arises.

In choosing the relatively long term of twelve years the authors of the project had in mind not merely to secure the tenure of the judge and the desire to give the signatory powers the benefit of the experience obtained by the exercise of the judicial functions, but also to safeguard, as far as possible, the fundamental and controlling principle

of impartiality; for association in the analysis and development of international law, coöperation in judicial decision, would develop inevitably an *esprit de corps* which would necessarily influence each judge in the performance of his duties. Acting under judicial responsibility, individual opinion, indeed prejudice, would lose something of its rigidity, and the decision of the court would offer the highest guarantees for international impartiality.

ARTICLE 4. The judges of the judicial arbitration court are equal and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

The provisions of Article 4 are largely formal in their nature and self-explanatory. It, however, seemed advisable to the authors of the project to state the provisions in clear terms, so that as little as possible be left to conjecture.

The judges of the court are and must necessarily be equal. As they cannot occupy the same place at one and the same time, it seemed advisable to prevent the possibility of a dispute as to rank or position. Any one familiar with the history of diplomacy will recall the difficulty that grave and dignified diplomats have had in finding their appropriate places at international conferences. It seemed proper that the rank of the individual judge should be determined by the date of his appointment, as provided in Article 3, paragraph 1. But it might well happen that two judges were appointed on the same date and entered upon the performance of their duties simultaneously. To obviate disagreement or conflict, however trifling, the authors of the project provided that precedence should in that case yield to age. This provision is of importance in case the president and vice president do not take part in the determination of a case before the court (Article 26).

The second paragraph of the article assimilates the deputy to the titular judges in the performance of judicial functions, but indicates in clear and express terms that the deputies take rank after the titular judges, although among themselves the provisions of the first paragraph would apply.

ARTICLE 5. The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat the judges and deputy judges must swear, before the administrative council, or make a solemn affirmation, to exercise their functions impartially and conscientiously.

The second paragraph of the fourth article was added to bring the court of prize and the court of arbitral justice into harmony by the adoption of the paragraph in question in the court of prize.

This article is composed of two paragraphs, each dealing with a separate yet not dissimilar subject.

The provision that the judges shall, in the performance of their duties, enjoy the privileges and immunities of diplomatic agents is too familiar to need comment, and is taken without modification from the convention of 1899 (Article 24).

It cannot be denied, however, that the expression is rather general and indefinite in its nature, because the privilege and immunity referred to may concern solely the privileges and immunities in The Hague, or it may relate to diplomatic immunity in third countries. This ambiguity was called to the attention of the committee by Professor Lammasch, who aptly remarked that

it would be advantageous to define more clearly the words "and outside of their countries," because it is possible that a state may choose as judge a citizen or subject of another state, in which case it would be necessary to stipulate in Article 5 that "their countries" means "the countries of origin."

M. Kriege, representing the authors of the project, felt that a mention of the observation of M. Lammasch in the report would be sufficient, and that it was inadvisable to modify the text of 1899, which has been generally approved and accepted.

The second paragraph of Article 5 relates to the oath or affirmation which the judge or deputy judge is to take before entering upon the performance of his official duties. Any one familiar with the history of courts of justice knows that the matter of the oath and the supposed religious sanction attaching to it has, at times, created great difficulty in one and the same country. It will not escape reflection that men of the highest character and professional attainment have refused to take an oath, but have expressed their willingness to make a solemn affirmation. Controversy and discussion have resulted in authorizing a person, entering upon official duty, to pledge his conscience to faithful performance in the manner binding upon him

personally and individually, and affirmation is assimilated to oath. In countries of diverse nationalities and in which different religious systems prevail it would seem inexpedient to attempt to provide an oath binding upon all. It was suggested that the oath required for judicial officers in the respective countries might be the test, but as these differ there would be a lack of uniformity. It was therefore finally proposed by the authors of the project that the judge should take an oath or solemn affirmation to exercise judicial functions incumbent upon him impartially and conscientiously, and that for purely formal reasons this oath should be taken before the diplomatic representation, namely, the administrative council at The Hague. In this manner the oath or affirmation would be a matter of international record.

ARTICLE 6. The court annually nominates three judges to form a special delegation, and three more to replace them, should the necessity arise. They may be reëlected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

In the original text of the project the present article appeared as follows:

The High Court designates annually three judges, who will form during the year a special committee, and three others to take their places in case of inability.

A member of the committee shall not exercise his functions when the power by which he was appointed is one of the parties.

The members of the committee shall conclude the cases brought before them, even though the term for which they were appointed should have expired.

It will be seen that the article has undergone considerable modification in subsequent amendments, due to criticism and suggestion within the committee. These modifications are of two kinds, the first affecting the form, the second the substance.

His Excellency M. de Martens objected to the use of the words "special committee" as inconsistent with the nature and purpose of a court of justice. Desiring to overcome this objection, which was of a formal nature, because the functions would be the same whatever the name ultimately chosen might be, the drafting committee proposed

"commission," in order to bring the court of prize and the proposed court into an exact harmony. M. de Martens objected that "special commission" was as unsatisfactory as "special committee," and proposed "special tribunal." The expression "special tribunal" was, however, objectionable, because the use of the word "tribunal" might lead to misunderstanding, as the word was used in a different sense in the convention of 1899. Another and a more fundamental objection to the use of the word "tribunal" seemed to exist in the fact that its presence might suggest that the small committee was in itself a separate and distinct court charged with the performance of certain duties and functions. As the purpose of the authors of the project was to create a single court for the decision of international difficulties of a judicial nature, it seemed inadmissible to use an expression which might by implication suggest the creation at one and the same time of two institutions. As the small body proceeded from the larger body and derived all of its power from the larger, it was finally suggested that the expression "delegation" would indicate the source, that it would not even by implication create an independent body, and that it might hope to meet, as it actually did, the objections made to the various designations. The expression "special delegation" was therefore used in the first instance, but in the subsequent articles the small body is referred to as "delegation" without the adjunction of the word "special."

In the next place the wording was criticised as faulty because while providing that three members should be designated, the method of their selection was left undetermined. For that reason it was provided in the amended text that the three members, and the deputies to replace them when unable to act, should be elected by ballot by the court, and that those should be considered elected who received the greatest number of votes.

His Excellency M. de Martens proposed that the three members and their deputies, composing the delegation, should be capable of reelection. The right of the court to designate the members necessarily presupposes this possibility, but the Committee of Examination followed the suggestion of M. de Martens by stating it *expressis verbis*.

The original text of Article 6 made no reference to a president of the delegation, it being supposed that the rules of court would prescribe the necessary regulations. However, it was subsequently

decided that the article should be complete in itself and not leave a matter of such importance to future regulation. The delegation, therefore, was given power to elect its president by majority, and failing a majority, to select him by lot.

The emendations of paragraphs 2 and 3 of the article under consideration went to their substance. The authors of the project meant to exclude from the delegation subjects or citizens of the party in litigation, believing that their presence in such a small body might tend to destroy the judicial character of the delegation by assimilating them too closely to arbiters.

M. Lammasch suggested that a nation entitled to appoint a judge of the court of arbitral justice might select a subject or citizen of another country, and that, during his tenure of office and presence in the delegation, the country of his origin might appear as plaintiff or defendant before the delegation. In order to insure the largest measure of impartiality he proposed to insert after the words "the country which appointed him" the clause "or of which he is a subject or citizen." The proposition was immediately accepted and appears in the final text.

The third paragraph of Article 6 permits the delegation, as composed at the time of the submission of a case, to sit until the case has been disposed of, even although the year of their appointment shall have expired. It is admitted that this provision can be questioned in theory, as was pointed out by President Bourgeois, because it might happen that two delegations would be sitting, at least for a while, at one and the same time. But the authors of the project took counsel of practice rather than theory and fortified themselves by the maxim *interest reipublicae ut sit finis litium.* The submission of a case partially decided to new judges might prolong indefinitely a decision, and theory may well yield to practice to subserve the interest of justice. Another reason for the extension in question arises from the fact that the matters submitted to the delegation are of a nature to be rapidly decided, and that the theoretical difficulty is likely to be the exception instead of the rule.

His Excellency M. Asser felt that the period of a year was too short, and that the difficulty would be overcome by lengthening the term. The authors of the project opposed this suggestion, and their views were set forth by M. Kriege as follows:

The judges will hold in the special commission a very peculiar position and their functions will be of a very delicate nature. The court must therefore be given an opportunity to form an estimate of their respective industry and fitness, and the facility of replacing them within a comparatively short period. If any member stands the test, the court may, by reëlecting him, avail itself of his experience. . . .

The authors of the project thought it advisable to enable eminent and busy men to serve on the commission without relinquishing their high positions at home, which would undoubtedly be the case if they had to occupy their seats for more than one year.

The purpose of the provision in question was to present a ready means of settling a difficulty by providing a small body of judges to which it could be presented and decided. The proceeding is therefore in the nature of a summary proceeding, and, the designation being for a year, would permit a small delegation of trained judges in permanent session during the course of the year to receive and decide any cases presented. At the same time the limitations of their mandate would prevent them from constituting themselves in permanence and creating within the court an institution which might compete with it. The reason advanced by M. Kriege that jurists of recognized ability might be willing to serve on the commission for a year, whereas it might be impossible for them to serve on it for a longer time, seemed to the authors of the project sufficient reason why the mandate should not be extended beyond a year. The possibility of reëlection would in itself seem to meet the objection of his Excellency M. Asser.

ARTICLE 7. A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the judicial arbitration court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

The project in all its parts looks to the impartial administration of justice, for partiality is quite as unpardonable and objectionable in an international as in a municipal court, and the authors of the project devoted themselves with singleness of purpose to secure and safeguard that impartiality, without which an international court would be without business as it would be without respect.

To secure this impartiality and to prevent even the breath of suspicion, the judge of the court of arbitral justice is forbidden to take part in the decision of the case, if he has officiated as a judge in its former disposition. If the case was originally decided in a national tribunal of which the international judge was at that time a member, or if he sat as arbitrator in a tribunal of arbitration, or if he was a member of a commission of inquiry which found the facts, or, finally, if he had been previously employed as counsel or advocate of one of the parties in the decision of the case which is submitted to the determination of the court of arbitral justice, it seems indispensable in the interest of justice that such a judge, considering his judicial antecedents, should not be permitted to take part in the decision of the case in the court of arbitral justice. Human nature is prone to justify itself, and experience shows that judges are not wholly free from the frailties of mankind. It is not intimated that a judge in the performance of his official duties would be influenced by his previous conduct and decision, but the fear that he might be influenced is sufficient in itself to disqualify him from taking part in the decision of the case. It may be that a judge so placed would strain a point not to be influenced, and, if so, such conduct would be detrimental to the interests of the parties. It therefore seems advisable to remove him from all possibility of criticism, and by so doing perform a service to him as well as create confidence in the court.

Respect for the position and situation of the judge requires that he shall not appear during the tenure of his office as agent or advocate before the court of arbitral justice. As there is established an intimate relation between the new court and the Permanent Court of Arbitration, it was likewise thought advisable to prevent his appearance in any capacity before this august tribunal. The objection to his officiating as advocate or agent before a special tribunal of arbitration is not perhaps so cogent, nor is his exclusion from a commission of inquiry justified by the same imperious necessity; but the duties of agent and advocate are so incompatible with the calm and poise of a judge that it seems advisable, in the interest alike of judge and court, to prevent him from uniting in his person these different and at times incompatible qualities.

The foregoing prohibitions would seem adequately to cover the subject, but in order to prevent indirectly the performance of duties

incompatible with judicial impartiality, the authors of the project forbade the judge "to act for a litigant, in any capacity whatsoever, during his tenure of office." This latter clause would prevent him from giving advice and counsel to parties litigant, even although he did not appear as agent or advocate. It seems, therefore, that the judge is to devote himself to his judicial duties with singleness of purpose during his entire term, and the possibility of his being interested, either directly or indirectly, in any capacity other than that of judge is excluded by the express wording of the article.

It should be added that the provisions of the article in its present form were adopted by the committee without observation.

The original text of the first paragraph of the foregoing article was as follows:

> In no case shall a judge take part, except with the express consent of the litigant parties, in the examination or hearing of a case pending before the International High Court of Justice, when one of the parties shall be the power by which he was appointed.

The presence or absence of subjects or citizens upon the court, when their country of origin is a party to the proceeding before it, gave rise within and without the committee to grave discussion and reflection. It is familiar doctrine that a man should not be judge and advocate in his own cause, and this provision obtains in all systems of national jurisprudence. The purpose of the American delegation in proposing the establishment of a new court, composed of judges, was to secure not approximate but that absolute justice which obtains in a highly organized and well-regulated court of justice. It did not mean to question the impartiality of nationals. It meant to remove from them any suspicion of partiality which might arise if they passed judgment upon a case in which their own country or the country appointing them was involved or interested. The American delegation therefore wished to exclude from the proposed court an American judge, supposing he was a member of the court at the time when an American case was submitted, and to leave the decision of the court solely to the foreign judges. In this view the British delegation concurred.

The German delegation, however, felt that the presence of a national upon the court at such a time would be a guarantee that the national view would be carefully presented to the judges in chamber, and that the assistance of such a one in drawing up the final

judgment would be an advantage both from his familiarity with national jurisprudence and from his desire to prevent the formulation of the judgment in such a way as might seem to reflect, unwittingly or improperly, upon the nation of which he is the appointee.

These arguments are of themselves convincing, unless their realization should affect the question of impartiality. In a small court the presence of a national might cast a suspicion of partiality, as is the case with small tribunals of arbitration, where the struggle of each party is supposed to be to win over the umpire. In a large court, however, the difficulty of convincing a majority would be so great that the suspicion of partiality could not easily arise. The proposition, therefore, of the German delegation, that nationals should sit in cases in which their respective countries were involved, was accepted by the American and British delegation.

A strong and convincing argument for the German amendment lies in the fact that the court sought to be created is an international court, and that its jurisdiction depends upon general or special agreements of arbitration. The essence of arbitration consists in the free choice of judges. It would seem unwise to exclude nationals unless the reasons for their exclusion were overwhelming. The resort to arbitration should not be discredited, and the desire of its friends should be rather to cure the defects than to kill the system. As, therefore, the presence of nationals in a numerous body is unlikely to impair the usefulness of the court, and possesses, on the contrary, the advantages mentioned in the German amendment, and in addition preserves intact the arbitral character of the tribunal, the amendment was unanimously adopted by the Committee of Examination.

The amendment proposed and accepted has the advantage not merely of meeting a general desire but of carrying out a suggestion made by the Russian government in 1899, for the constitution of a tribunal of arbitration, of which the third article is as follows:

> If there should be among the litigant powers one or more unrepresented in the arbitral tribunal, . . . each one of the two litigant parties shall have the right to be represented therein by a person of its choice, in the capacity of judge, possessing the same rights as the other members of the said tribunal.

The presence of nationals within the court is important from another point of view, namely, because its decision is not limited in

its effect to the nations in controversy. It affects international law as a whole, and the nationals should not be disqualified, merely because their respective countries are parties litigant, from contributing to and influencing the development of international law.

ARTICLE 8. Every three years the court elects its president and vice president by an absolute majority of the votes cast. After two ballots the election is made by a bare majority, and, in case the votes are even, by lot.

The provisions of this article, short and simple as it is, are yet of fundamental importance, for it means that the court is to choose its own officers by ballot without dictation. The president is not to be imposed upon the court, neither is he to be selected by an alphabetical arrangement nor by lot. The court itself is to determine the qualities it prefers in a president, and elect as presiding officer the one in whom those qualities reside.

The vice president is likewise selected by the court, and as he is to preside in the absence of the president, it is to be supposed that he will possess the qualifications in as eminent a degree as the president himself.

As the selection of these officers is of vital importance, the article provides that the election shall result from an absolute majority of the members of the court on the second ballot. Should no candidate receive this absolute majority, plurality will suffice to elect; and if opposing candidates should receive an equal number of votes, lot will decide between them. It is unlikely that all of these methods of election and selection will be resorted to, but it seemed advisable to specify them in the article for the sake of completeness. A difficulty inevitably exists in case of a tied vote, which can be easily met by drawing lots, even although there are other methods. For example, the senior judge in date of service, as evidenced by his oath of office, might be declared elected. What shall be done, however, if the two candidates in question took oath on the same day? In such a case the age of the respective candidates might be considered, as wisdom and experience are supposed to come with age. The committee seemed to prefer this method of selection, and the last clause of the article was directed to be modified in this sense. The Committee of Examination, however, did not find the reasoning convincing, and on second reading the article was adopted as stated above.

It will be noted that the president and vice president are selected for a period of three years. This period is in its nature arbitrary. It was felt that the court should have the benefit of the experience obtained by the presiding officers in the performance of their judicial duties, and that this experience might be lost if an election took place every year. If a presiding officer prove himself competent and equal to his duties, he can be reëlected. Should he fail to meet the expectations of the court, another may be selected in his place. To the authors of the project less than three years seemed too short. More than three years might prove an embarrassment in the highly improbable event that the presiding officer failed to command the confidence of his colleagues.[1]

ARTICLE 9. The judges of the judicial arbitration court receive an annual salary of 6000 Netherland florins. This salary is paid at the end of each half year, reckoned from the date on which the court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present convention they receive the sum of 100 florins per diem. They are further entitled to receive a traveling allowance, fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the court dealt with in Article 31, and are paid through the international bureau created by the Convention for the Pacific Settlement of International Disputes.

In the original text the salaries of the judges, as well as the additional compensation to be received by them for the performance of their professional duties at The Hague, were omitted. In other respects the final wording differs only in matters of style from the original form. Let us consider each paragraph in turn.

It was felt advisable that the judges of the court of arbitral justice should receive an annual salary of six thousand Dutch florins, for the reason that, as judges, they may be called at any time to officiate at The Hague, and that some specific allowance should be made for the services which they stand ready to render. The allowance is admittedly out of proportion to the services it is expected they will perform, but if a modest compensation is open to difficulty and criticism, the

[1] In the final business session of the conference held October 17, 1907, it was decided to omit from the project any indication of time for which the president and vice president might be elected. — *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 584–585.

committee felt that a larger amount would be open to greater and more serious objections. If the honorarium be the attraction, rather than the dignity and the nature of the employment, it is possible that politics rather than fitness might enter into the selection. An advocate with a large practice could not be expected to absent himself for long periods; but a judge of fine qualities, rather than a successful advocate, is required for the court of arbitral justice. As jurists rather than practitioners are to be selected, it will not appear that this compensation, modest as it is, is to be despised. If it be borne in mind that the judge does not, at least at present, need to reside permanently at The Hague, and may therefore follow his profession or calling in his own country, it will be seen that the compensation, small as it may seem, is not the sole source of his income; it is additional to it, and therefore is not so insignificant as it would appear at first sight.

The honorarium is, according to the article, to be paid semi-annually, to date from the first meeting of the court.

There is a further provision that the judges in active service shall receive an additional sum to cover expenses during their official residence at The Hague. This allowance, while not generous, seems adequate, and it was felt by the committee that one hundred florins a day would cover the ordinary expenses to which a judge would be subjected. But as the judges are to be taken from all parts of the world, it is obviously unjust that they pay their expenses of travel to and from the court. Were this so, in many cases the position of judge might become a burden, and would entail not merely sacrifice of professional employment, but the additional outlay for necessary and incidental traveling expenses. The committee deemed it inadvisable to fix any rate of mileage. The provisions of each country in the matter of traveling allowances seemed, on the whole, the fairest standard.

While these dispositions relate principally to titular judges of the court, the deputies, while acting as judges, are clearly entitled to equality of treatment. But there is this difference, that the titular judges receive a fixed salary, while the deputies only receive traveling expenses and the daily allowance of one hundred florins while engaged in the trial of cases.

In the original text the various sums mentioned were to be borne by the signatory powers, according to the proportion established for the Bureau of the Universal Postal Union, whereas in the final form

the general expenses of the court are to be paid by the international bureau, according to the subsequent agreement of the signatory powers.

ARTICLE 10. The judges may not accept from their own government or from that of any other power any remuneration for services connected with their duties in their capacity of members of the court.

The purpose of this article, like that of so many others in this project, is to safeguard in the largest possible measure the impartiality of the judges, and to protect them, directly and indirectly, from the slightest charge or suspicion which would reflect upon their honor or freedom and therefore upon their impartiality.

Article 9 provided that the judge should receive compensation at the hands of the signatory powers. Article 10 provides that he shall receive a salary for the performance of judicial duties solely from the powers, and that neither directly nor indirectly shall he receive compensation from the home government for the performance of his judicial duties. If he be a magistrate, if he be an officer of the state or a professor in a university under state control, he is in a certain sense supported by the state, but the salary received is of quite a different origin and is distinct from that received by him as judge of the court of arbitral justice. In the same manner it is provided that the judge shall not receive compensation from any other power, whether it be in the form of payment or in the more insidious form of gift; for either method would necessarily carry with it the idea of reward for past services, which idea is inconsistent with equal, exact, and impartial justice.

The provisions of this article apply not merely to services rendered in the court, but to any services in any other judicial capacity in accordance with the provisions of the project, such as membership in the delegation, membership in a commission of inquiry, etc.

ARTICLE 11. The seat of the judicial court of arbitration is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

This article looks to the physical permanence, as it were, of the court. It is not enough that the judges be selected and definitely known; the court itself must meet at a certain time and in an ascertained place. That place, by general agreement, is The Hague. The

reasonableness of this provision was such as to secure its unanimous acceptance without discussion.

As the purpose of the delegation is different from that of the court, it seems to follow that the provisions concerning it might differ. Such is the case, for it is provided that the delegation may, with the assent of the parties litigant before it, choose another place for its meetings if special circumstances require it. The reason for this is that the delegation is meant to be a small, permanent body, formed out of the general court and representing it in small matters. Its membership is purposely small, so that the business before it may be rapidly transacted.

It is likewise purposely small, so that it may be enlarged to meet the requirements of a particular case; and Article 20 permits either party litigant to designate a judge of the general court to sit with the delegation. If the delegation, as seems probable or at least possible, act as a commission of inquiry, then each party in controversy has the right to add a member chosen within or without the court. If it be used for a trifling dispute, and if its presence in a place other than The Hague seems advantageous to the litigants, then its place of meeting may be changed upon request and agreement of the parties. If it sit as a commission of inquiry, that is to say, for the finding of fact rather than the discovery or application of a principle of law, freedom is left to it to meet, upon request of the parties, where the facts in dispute and the evidence to support them may be most readily ascertained or procured.

In considering the question of the use of the delegation for purposes of commissions of inquiry, his Excellency M. Eyschen asked if the delegation is required to act as a commission of inquiry if requested. The question involved is of fundamental importance and was considered by the committee in its larger aspect, namely, whether or not the judges of the court are obliged to exercise judicial functions as commissioners of inquiry, or in any other capacity for which they may be requested. The obligation to serve seems to arise from the very nature of the case, for the judge is appointed, takes the oath, and receives the compensation allowed by Article 9, on condition that he fulfill the duties of his high office. It would seem that the obligation of the judge to exercise his judicial functions in accordance with the terms of his mandate is so normal and so manifest as to make it useless to stipulate it expressly.

It is indeed true that the judges of the Permanent Court of Arbitration are not obliged to serve, but the judges of the new court of arbitral justice are salaried officials. His Excellency M. de Martens considered the matter of very grave importance, as it seems to imply the right of the judges to refuse to perform their judicial duties. He recalled the fact that the powers quite frequently, for one reason or another, met refusals from members of the Permanent Court whom they had approached. No one is compelled to accept appointment to the court, but from the moment the position is accepted the obligation must be discharged; its duties may not be evaded by any one. His Excellency M. de Martens further pointed out the necessity of making, by positive stipulation, the members of the court independent of their governments. Without such a precaution a state could easily, on political grounds, reprove a judge, over whom it has jurisdiction, for accepting the office of judge in such or such a case.

The president of the committee answered that it was clear that the judges of the new court were to be salaried officers of the international judiciary; that unless lawfully challenged they will be bound to sit in judgment; that the necessity of a new text is not apparent; that it would be sufficient to define in the report the character of the functions and the obligations therein involved, and to mention in the minutes the remarks made and the agreement reached in the committee in that respect.

The committee was satisfied with the explanation given, and it does not seem advisable to state in positive or express terms a duty incumbent upon a judge by the very nature of his appointment and acceptance of office.

ARTICLE 12. The administrative council fulfills with regard to the judicial court of arbitration the same functions as to the Permanent Court of Arbitration.

The provisions of this article seem to require neither comment nor explanation, for it is a further indication of the necessary and close relation between the proposed court and the Permanent Court of Arbitration.

ARTICLE 13. The international bureau acts as registry to the judicial court of arbitration, and must place its offices and staff at the disposal of the court. It has charge of the archives and carries out the administrative work.

The secretary general of the bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators, and shorthand writers are appointed and sworn in by the court.

The original text is as follows:

The international bureau of the Permanent Court of Arbitration performs the duties of clerk for the International High Court of Justice. It has the custody of the archives and manages the administrative business.

It will be seen that its scope is somewhat enlarged and completed in the final wording. In either form the article is another example of the close and necessary connection between the two courts. For just as the administrative council is common to both courts, the international bureau is likewise at the service of both. It is the clerk's office for the proposed court and places at its disposition its quarters and staff. It has the custody of the archives and the supervision of administrative duties. In addition the secretary general of the International bureau acts as clerk of the proposed court.

The third paragraph of the article is new and is based upon the discussion and the revised provisions for the commissions of inquiry and the international prize court. The experience of the last few years has shown the necessity of translators and the difficulty of securing them. In the same way, the presence of stenographers is essential to the prompt administration of business. It was thought advisable to provide in express terms that these functionaries should be designated by the court and that they should take the oath of office or solemn affirmation before the court for the faithful performance of their duties. By these provisions, trifling as they may seem, it is hoped that the delay and difficulty experienced in the past will be obviated.

ARTICLE 14. The court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a power is party in a case actually pending before the court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the court in extraordinary session.

The phraseology of this article has undergone, at the hands of the committee, considerable modification, and very great improvement. In its original form it was as follows:

The high court meets in session once, and, the occasion therefor arising, twice a year. The sessions will open the third Wednesday in July and the third Wednesday in January, and will last until the business on the docket has been transacted.

The sessions shall not be held if the special committee decides that business does not demand it.

The provisions of this article are important, for they affect in large measure the permanency as well as the impartiality of the court, that is to say, the two fundamental and controlling ideas of the authors of the project.

In proposing that the court be established in permanence, the American delegation had in mind the necessary corollary, that the judges should themselves reside in The Hague, ready at any time to undertake the important duties which might be confided to them. It was objected that residence in The Hague would practically denationalize the judge, an objection which failed to impress the American delegation, whose great desire was to free judicial decision from national bias.

It was further suggested that it would be as undignified to the court as it would be embarrassing to the judges to be in permanence, if few or no cases should be presented in the first months or years of its establishment. The reply to that was and is, as indicated by their Excellencies Mr. Choate and Baron Marschall, that the foreign offices of the signatory powers are burdened with the weight of international cases awaiting final disposition, and that if the court were established and commanded the respect of the world, the signatory powers would vie with each other in presenting cases to it. Indeed, the fear of Baron Marschall was that the court would be overworked at the beginning of its career. Mr. Choate called attention to the fact that in the first years of the existence of the Supreme Court of the United States there was little or no litigation before it, that it frequently adjourned for lack of business, and that it was only as the court established itself in confidence that business flocked to it. There was, therefore, no reason to prevent the court of arbitral justice from being in permanence, as the Supreme Court has been, ready to receive the cases presented to it.

Another view may be mentioned, namely, that of his Excellency M. Asser, who believed that most matters would be presented to and

decided by the delegation, so that it was a matter of comparative indifference how often the court met or how long it remained in session. This view failed to commend itself to the authors of the project, whose intention was not to intrust a small committee with the decision of international conflicts of grave importance, but to reserve them for the enlightened and profound consideration of a court adequately representing and versed in the various judicial systems of the world.

It was finally agreed that the court should meet at least once a year, and that it should remain in session until the cases properly presented and ripe for decision should be decided. The date of meeting, necessarily arbitrary, was set for the month of June and as nearly as possible to the opening of the Second Conference.

In order to prevent a session of the court without cases for its consideration, the second paragraph authorized the delegation to inform the judges that there was no case awaiting their decision, and thus prevent the expenses incident to the assembling of the court. This provision, wise in itself, seemed open to criticism because it placed the court under the control of the delegation, instead of placing the delegation under the control of the court. This objection was admirably stated by his Excellency Count Tornielli in the following language: "If the commission may decide that the business does not require the convocation of the court, it may well happen that certain cases will remain in abeyance. This power of the commission seems arbitrary."

It was suggested that the court might frame a rule for such a case, but the committee hesitated to invest the court with a power whose exercise might eventually imperil the usefulness of the institution. The president (M. Bourgeois) proposed the following amendment: "The session shall not take place if the commission decide that there is no business ready for submission."

The proposed restatement of the article was satisfactory to his Excellency Count Tornielli. The Committee of Examination, to which the matter was referred, accepted the principle and strengthened it by making the calling of the court obligatory, if a signatory and litigating power requested the convocation of the court. The wording as adopted was as follows: "However, when a power is party in a case actually pending before the court, the pleadings in which are

closed or about to be closed, it may insist that the session should be held."

The amendment as proposed and accepted was not intended to deprive the delegation of its right to call the court into session, but solely to remove from the delegation the power to prevent the court from assembling, if its convocation be desired by a party to the controversy.

Lest this amendment should seem to have a greater effect than its proposers intended, the final paragraph of the article confers in express terms this right upon the delegation in the following language: "When necessary, the delegation may summon the court in extraordinary session."

It is thus seen that Article 14 in its present form is a compromise based upon an exchange of views within the committee. One view would have had the court permanently in session; another view would only have the court summoned when the delegation considered that business was ripe for determination. The compromise consisted in making the sessions of the court depend upon the expressed will of the parties litigant, with the happy result of avoiding extremes, which, in matters of judgment and discretion, are doubly dangerous.

ARTICLE 15. A report of the doings of the court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting powers through the international bureau. It shall also be communicated to the judges and deputy judges of the court.

This article, which did not appear in the original project, was added at the request of the committee. As originally drafted it provided that "the special commission shall submit to the administrative council an annual report upon the labors of the court. The said report shall be communicated to all the judges and deputy judges of the court."

The first sentence requires that an account of the proceedings (*compte rendu*) of the court shall be prepared annually by the delegation, setting forth the work of the court as well as that of the delegation. But the *compte rendu* has an importance and interest far transcending its communication to the court. The judgments of the delegation will affect not merely the immediate parties in controversy, but will be of profound interest to the signatory powers at

large. Therefore it seemed indispensable that the *compte rendu* should be transmitted to the signatory powers by the administrative council.

His Excellency M. de Martens felt that the original wording of the article, namely, that a report be presented to the administrative council, was open to objection, because the duty might seem to involve the relation of superior and inferior, and he did not think it wise to establish such a relation, even by implication, between the administrative council and the court. He further feared that this course might seem to confer upon the administrative council the right of examination and criticism, whereas, in his view, the administrative council should confine itself solely to transmitting the report without criticism or comment.

In order, therefore, to meet these objections, the Committee of Examination decided to substitute the international bureau for the administrative council as the medium of transmission, and by the use of the expression "*compte rendu*" to make the performance of the duty simply clerical. It was further decided by the committee that the *compte rendu* in question should likewise be communicated to the judges and to the deputy judges.

ARTICLE 16. The judges and deputy judges, members of the judicial arbitration court, can also exercise the functions of judge and deputy judge in the international prize court.

In the original project this article appeared provisionally as follows: "Provisions regulating the relations between the International High Court of Justice and the international prize court, especially as regards the holding of judicial office in both courts."

It was intended by the authors of the project to establish between the proposed prize court (now fortunately adopted by the conference) and the present proposed court the close relations which exist between the Permanent Court and the proposed court of arbitral justice by permitting the judges of the court of arbitral justice to act as judges in the prize court. The purpose of the project was not to subordinate either court to the other, but to indicate to the powers the possibility, indeed the advisability, that the judges of the court of arbitral justice should possess the qualifications fitting them for judges of the prize court.

The articles already cited and discussed deal exclusively with the organization of the court of arbitral justice and suggest only incidental questions of jurisdiction. The second title of the project deals with the competence and procedure of the proposed court, and is therefore of the highest importance. The organization is, as it were, the covering; the competence and procedure are the essence.

ARTICLE 17. The judicial court of arbitration is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

The original text of this article was as follows:

ARTICLE 16. The International High Court of Justice will be competent to deal:

1. With all cases of arbitration which should, under a general treaty concluded before the ratification of this convention, be submitted to the Permanent Court of Arbitration, unless objected to by one of the parties.

2. With all arbitration cases which shall be referred to it under a general treaty or special agreement.

[*Proposition of the German and American Delegations*]

3. With the revision of the awards of arbitration tribunals and of the reports of commissions of inquiry, as well as with the framing of rights and duties flowing therefrom in all cases when the parties apply to the high court for that purpose under a general treaty or special agreement.

The original text shows that a marked difference of opinion existed among the authors of the project, and it is therefore not astonishing that a like divergence of view should manifest itself in the committee.

The authors of the project intended to give the widest liberty to parties litigant to choose between the two courts, and therefore provided that a case of arbitration arising under a general treaty of arbitration, concluded before the ratification of the convention establishing the court, might be submitted to the court for determination, and that the court would take jurisdiction thereof unless the other party to the controversy opposed.

The second paragraph made the court competent to consider all cases of arbitration presented to it by virtue of a general treaty or of a special agreement.

The third paragraph sought to specify in detail the various matters which might come before the court by virtue of a general treaty or

special agreement, by providing that the awards of courts of arbitration and reports of commissions of inquiry might be, upon the express agreement of the parties, submitted to the court for review.

As regards the reports of commissions of inquiry, the delegations of Germany and of the United States of America were inspired by the amendments proposed by Russia to the convention relating to commissions of inquiry, as it seemed not improbable that parties in controversy might wish to submit the findings of a commission of inquiry to a judicial tribunal in order that the rights and duties arising from the facts found by the Commission of Inquiry might be determined in a judicial proceeding.

It should be said, however, that the delegation of Great Britain believed it inadvisable and unnecessary to express this eventuality in an article, because, as the submission to the court would arise solely by the voluntary agreement of the parties in controversy, it deemed it unnecessary to stipulate in an article that the parties could do specifically what they were generally empowered to do. The delegations of Germany and the United States felt that the special article would remove any doubt as to the jurisdiction of the tribunal to entertain such controversies if presented, and that therefore the paragraph would subserve a highly useful purpose.

The opposition to the article as originally framed was led by his Excellency M. Fusinato, who observed that paragraph 1 of Article 16 created a presumption in favor of the new court, and expressed the opinion that a convention could not be modified without the consent of the parties. "It is not enough," he said, "to grant the parties the right to object. It would therefore be desirable to add to the paragraph the proviso that it be 'with the express assent of the parties.' But if so modified, paragraph 1 becomes useless, as the case contemplated by it is already provided for in paragraph 2 of the same article."

As to paragraph 3 of the article, M. Fusinato remarked that, as a rule, revision can only take place before the judge who pronounced the sentence, so that the recourse contemplated in paragraph 3 would not be a revision, but a judgment on appeal or annulment. If the parties agree to resort to the new court under the conditions set forth in paragraph 3, they certainly may do so; but this case comes within the general provision of paragraph 2, and paragraph 3 should therefore be suppressed.

In regard to the objection to the first paragraph of the original draft, it is sufficient to say that the committee shared M. Fusinato's view, and was unwilling to create, directly or indirectly, a presumption in favor of the proposed court. As remarked by Professor Renault, if the new court won universal approbation, it could only be by reason of its merits and its advantages. As the competency of the court is solely to depend upon the express assent of the parties, it follows that the distinction between paragraphs 1 and 2 of the original text falls and is no longer necessary. The committee therefore decided to suppress the first paragraph. The second paragraph, based as it is upon the express agreement of the parties, was unanimously accepted.

It was, however, suggested that the word "general," qualifying "treaty," should be omitted, but that the phrase "special agreement," accompanying it, be retained. M. Renault explained that the antithesis between the two expressions "general treaty" and "special agreement" would indicate that in the first case the controversy could be submitted to arbitration under the provisions of a general treaty of arbitration or of a general clause of arbitration contained in the treaty; whereas the phrase "special agreement" would refer to an agreement of the parties to submit a special controversy to the court, whether bound or not to do so by an antecedent treaty. He therefore proposed the following happy formula: "by virtue of a stipulation to arbitrate or of an agreement to arbitrate." The committee adopted the principle laid down by Professor Renault and embodied it in the final text of the article in the following form: "The court of arbitral justice is competent to deal with all cases submitted to it, by virture of a general stipulation to arbitrate, or of a special agreement."

The third paragraph of the original draft gave rise to animated discussion and searching criticism. The difficulty in the matter of revision arises, as was pointed out by M. Fusinato, from the possible confusion between "revision" in the strict sense of the word and "appeal." Now "revision" implies, indeed presupposes, in general a reexamination before the tribunal or judge pronouncing the original decision, as appears from Article 55 of the Convention of 1899 for the Pacific Settlement of International Disputes, which permits the parties litigant to reserve in the compromis the right to demand the revision of the arbitral award. By virtue of this article the revision proceeds from the express agreement of the parties, as evidenced by the

act of submission. The right of revision exists because it is expressly reserved. If, therefore, the parties agree to invest the new court with jurisdiction of the cases contemplated by paragraph 3 of the original draft, they may assuredly do so. In such a case the submission to the court would arise solely from the "special agreement," that is to say, from the express will of the parties. Viewed in this light, the reason for the separate existence of the paragraph fails and the committee decided to suppress paragraph 3, with the distinct understanding, however, that the "special agreement" referred to in paragraph 2 permits revision by the court of arbitral justice.

ARTICLE 18. The delegation is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the Convention for the Pacific Settlement of International Disputes, is to be applied.

2. To hold an inquiry under and in accordance with Part III of the said convention, in so far as the delegation is intrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the court or of the delegation itself.

Article 17 dealt with the general jurisdiction of the court of arbitral justice. Article 18 deals with the limited jurisdiction of the delegation.

In the first place, the delegation is clothed with jurisdiction to consider the cases of arbitration enumerated in the preceding article, if the parties agree to the "summary proceeding" proposed by the French delegation. An examination of the French proposal to that effect shows that it aims solely to provide a court ready at all times for the trial of questions of trifling importance. The machinery for the selection of judges created by the convention of 1899 is slow and cumbersome, and in small cases it seems unlikely that litigants will resort to it. The French delegation therefore proposed an easier and quicker method to constitute the court and to decide the case submitted with the least possible delay. For this reason the proceedings before the court are to be written, not oral, although the testimony of witnesses or experts is permitted, and the tribunal possesses the right to summon them in accordance with the provisions of the following article:

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The Tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in court it may consider useful.

The French proposition does not sacrifice care and deliberation to rapidity of procedure, but lays stress upon the fact that it is often more important to settle small matters rapidly than to subject them to the careful, and therefore protracted, examination of a large tribunal.

The first sentence of the second paragraph is the same as in the original text, with the exception of some formal changes which in no way affect the sense. Its purpose is to make the delegation competent to sit as a commission of inquiry if chosen by the parties for such a purpose. The declaration of competency does not of itself convert the delegation into a commission of inquiry: it merely authorizes the delegation as such to act as a commission if chosen by the parties, otherwise not.

Such at least was the opinion of the authors of the project, but the Austro-Hungarian delegation moved to withdraw the competency from the court. Professor Lammasch recalled the distinction made in 1899 between the Commission of Inquiry and the arbitral court, and declared that in his opinion the two were incompatible. One answer to this objection is that there does not seem to be any reason why the delegation should be incompetent if the parties wished it to act, because judges trained in weighing and sifting evidence for the sole purpose of ascertaining the facts of a case would be peculiarly qualified for commissioners of inquiry. The fact that each party might add a member to the delegation (Article 20), who would probably be a technical expert, shows clearly that the delegation when sitting as a commission of inquiry would not act as a court. There would seem, therefore, to be no reason in the nature of things to prevent the delegation from acting as a commission of inquiry.

This reasoning did not, however, convince M. Lammasch, who admitted that the members of the delegation might properly act as commissioners if chosen, but insisted that the delegation as such should not be chosen, as it would be tempted to act as a judicial tribunal rather than as finder of facts.

The president (M. Bourgeois) pointed out that inasmuch as Article 10 of the project relating to commissions of inquiry provided that the parties should have absolute freedom in composing the commissions, it seemed difficult to prevent them from applying to the delegation. It is obvious that the spirit of the Commission of Inquiry must not be confounded with that of the court, but if the purpose be to restrict the functions of the judges, it should be so stated in express terms.

The difficulty was solved by a vote of the committee for the maintenance of the article as proposed.

It therefore being decided that the delegation could act as a commission of inquiry, if requested by the parties litigant, the question was raised and discussed whether the members of the delegation should receive extra compensation for such services. His Excellency M. Asser felt that they merited additional compensation, but his Excellency Mr. Choate, by a comparison of Articles 17 and 20 of the project, demonstrated conclusively that only members of the Commission of Inquiry not chosen from the judges of the court should receive special remuneration, whereas, on the other hand, no special compensation should be allowed to the members of the court.

As pointed out by M. Renault, paragraph 2 of Article 8 is decisive, because it allows a certain sum to the judges of the court during the session or the performance of the duties created by the convention. For a like reason the traveling expenses should be allowed if members of the delegation are obliged to sit elsewhere than at The Hague. His Excellency the President of the Conference, M. de Nelidow, remarked that these allowances were included in the costs of the case, and that it was only necessary to mention this fact in the report and minutes.

The committee thereupon dropped further consideration of the subject and took up the question of the special jurisdiction with which the delegation should be vested.

The intention of the authors of the project in creating the delegation was to have ready and at hand a small body capable of enlargement and modification in order to decide speedily and with judicial certainty questions of lesser importance. His Excellency M. Asser advanced the opinion that to limit the jurisdiction of the delegation was tantamount to restricting the choice of the parties, because if they preferred to apply to the delegation, why should it not receive and determine the matter in controversy?

The answer would seem to be twofold: the first answer to M. Asser was that the American delegation could not accept his proposition. Desiring the establishment of a court of justice, not a special committee to be endowed with the same powers and jurisdiction as the court, it therefore must reject a provision which would strip the court of all its authority and leave it nothing but the annual election of the three members of the delegation.

A stronger and more convincing reply was made by Mr. Crowe, who said:

While Article 18, paragraph 1, does restrict the freedom of the parties, it is in the interest of the court itself. The court's decisions are destined, in the authors' opinion, to create a jurisprudence and gradually to develop international law by the weight and authority of its judgments. I therefore think it very unwise to endanger the authority of its decisions by permitting a small committee of three members to pass upon questions of fundamental importance.

Upon reference to the committee, the motion to make the jurisdiction of the delegation coextensive with that of the court of arbitral justice was negatived.

The final sentence of Article 18 is an addition to the original wording, and was added pursuant to a suggestion of M. Renault, who felt that the presence of judges familiar with the facts found by the delegation sitting as a commission of inquiry would be of great advantage whenever the parties in controversy submit, by special agreement, the findings of the commissioners to the court or its delegation for further and final determination. The Committee of Examination recognized that the functions of finders of fact and interpreters of law were so different in theory and in practice that there was no occasion to exclude the members of the delegation if the parties desired their presence. The following paragraph was therefore proposed and accepted.

With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the court or of the delegation itself.

ARTICLE 19. The delegation is also competent to settle the compromis referred to in Article 52 of the Convention for the Pacific Settlement of International Disputes, if the parties are agreed to leave it to the court.

It is equally competent to do so even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the compromis should be settled in some other way.

2. A dispute covered by a general treaty of arbitration, concluded or renewed after the present convention has come into force, providing for a compromis in all disputes, and not either explicitly or implicitly excluding the settlement of the compromis from the competence of the delegation. Recourse cannot, however, be had to the court, if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.[1]

This article was numbered 18 in the first draft and was worded as follows:

The delegation is also competent to settle the compromis referred to in Article 31 of the convention of July 29, 1899, if the parties are agreed to leave it to the court.

It is equally competent to do so even when the request is only made by one of the parties concerned, if all attempts have failed to reach an agreement through diplomatic channels, in the case of:

1. A dispute arising from contract debts claimed as due to the nationals of one country by the government of another country, and for the settlement of which the offer of arbitration has been accepted.

[*Proposition of the German Delegation*]

2. A dispute covered by a general treaty of arbitration providing for a compromis in all disputes and containing no stipulation to the contrary. Recourse cannot, however, be had to the high court if the government of the other country declares that in its opinion the dispute does not come within the category of questions to be submitted to compulsory arbitration.

The first two paragraphs of the original project met with little or no opposition and were adopted with the formal change proposed by his Excellency Count Tornielli, namely, that the words "a diplomatic agreement" be replaced by the phrase "an agreement through diplomatic channels."

The third paragraph, providing for the formulation of the compromis in the matter of contract debts, was thus explained. The proposition concerning contractual debts lays down the principle that states

[1] The subdrafting committee proposed to reverse the order of the last two paragraphs, and as the conference approved the change, the order is different in the official text of the draft convention. For the sake of convenience and clearness the original numbering of the paragraphs is preserved, as otherwise the reader of the report would be misled.

must not use force in collecting contractual debts, but must resort to arbitration. The enforcement of the principle depends on the compromis, and it is often more difficult to frame the compromis than to decide on arbitration. It therefore seemed advisable to intrust the formulation of the compromis to an impartial and neutral special committee, which would thus assist both parties and prevent a regrettable resort to armed force.

An examination of the provisions of the convention of 1899 dealing with this matter discloses an omission in Article 31. If the parties fail to agree upon the compromis, it is not concluded. This defect we propose to remedy. The article was reserved at the first reading in order to await the vote on the project dealing with contractual debts, but in the second reading, on the 5th of September, the article was adopted in principle, subject to some changes of phraseology.

The proposition of the German delegation aroused perhaps greater discussion and interest than any article in the project. It will be noted that the proposal was not concurred in by the American and British delegations. The provisions of the article were thus explained and justified by the most competent authority, his Excellency Baron Marschall von Bieberstein:

Our proposition is conceived upon the same general lines as paragraph 1, but it possesses a much more general character. The case presented is that of the parties having concluded a treaty making arbitration compulsory — either in a general way or in specific cases — and providing for the signature of a compromis. I may take as an example the first two articles of the treaty between the Netherlands and Denmark.

Now the following difficulty may arise: the two parties, although agreeing in equal good faith to admit that the difference between them comes within the bounds of obligation, fail to reach an agreement as to the text of the compromis. The situation then becomes peculiar: two powers have erected machinery with a mutual promise to put it into operation when divided by a contention. A contentious case arises and they cannot use the machinery because of their inability to agree. In such a case compulsory arbitration, which shines on paper, vanishes in fact. This condition of things would be contrary not only to the great idea of compulsory arbitration, but also to the great idea which impels us to exert our best efforts in the cause of the peaceful settlement of disputes among states. Arbitration would be compulsory as long as there is no dispute, but would become optional as soon as one arises. We favor compulsory arbitration, but desire it to produce practical results. We wish to perfect it so that it will become an available reality.

In accordance with this sentiment I have the honor to offer the following proposition: if two parties agree to admit that a dispute comes within the bounds

of the obligation, and if no agreement can be reached on the compromis, each of the parties shall have the right to demand that the compromis be made by the committee [delegation].

In a word, we propose the *compulsory compromis* as the complement of *compulsory arbitration.*

His Excellency Sir Edward Fry briefly stated the reasons why the other two delegations did not accept the baron's proposal. He considered it advisable to maintain the rule in paragraph 1, and not to make compulsory in one case what was optional in the other. He further remarked that the German proposition could not in any case change the application of existing conventions and could never be applied to them. But the compulsory character of its second part is very doubtful, since it is always possible that one of the parties will declare that the principle of compulsory arbitration does not apply. This provision is apt to invite governments to resort to falsehood by declaring that the contentious case does not come under the treaty, in order to evade the compromis.

His Excellency Mr. Choate likewise refused to accept the article in its original form. "The delegation of the United States of America," he said, "cannot accept the German proposition. As a matter of fact, it deals with desperate cases in which diplomatic negotiations have failed, and only with the hypothesis of a general treaty of arbitration.

"Nothing like this was ever inserted in the thirty treaties that have heretofore been concluded; it has never been proposed to impose a compromis not accepted by both parties.

"You are all aware, gentlemen, of the difficulties met with in the Senate in obtaining approval of the treaties signed by the American government. The delegation of the United States believes it is a matter of moral impossibility for it to sign at this time a convention providing for the eventual signature of the compromis in advance, without any knowledge of its text or scope."

It will be seen from these various quotations that there was an irreconcilable difference of opinion on this subject. The American and British delegations felt that the provisions of the article could not be well applied to treaties already concluded, when the parties had no knowledge of the fact that the compromis, which often decides the case, might be prepared by a body over which they had no

control. Its retroactive effect was therefore unacceptable, but they believed that the delegation might well be given the power to establish the compromis in cases of treaties concluded or renewed after the acceptance of the convention; for if the powers were unwilling to permit the compromis to be framed by the delegation, they could readily protect themselves by the insertion of a special clause in the treaty.

The German delegation, in a spirit of conciliation, took note of the criticisms, and presented, at a subsequent session, a revised text which met with the approval of the committee and was adopted. In its final form the clause is destitute of all compulsory features, and makes the power of the delegation to settle the compromis dependent practically upon the consent of both parties.

Turning now from matters of form to matters of substance, it would appear that Article 19 contains two separate and distinct parts: the competence of the court of arbitral justice or the delegation to establish the compromis when the parties appeal to the court for its formulation; and, second, the competence of the court or delegation to frame the compromis upon the request of one of the parties litigant.

Concerning the first there can be no difficulty, because if the parties are agreed, there can be no reason whatever why the delegation should not perform the service requested. The difficulty, however, in the second is very considerable, because the court is given the power to frame the compromis upon the demand of either party to the controversy. It cannot be denied, however, that the provision, not being retroactive but referring to the future, permits the parties to reach an agreement on the question at issue, should they so desire. The recourse to the court is not obligatory. If they have not concluded the compromis, then, lest the purpose of arbitration be frustrated, the article provides that the compromis shall be established by a thoroughly nonpartisan body, in no way connected with the controversy and having no interest in its determination other than to see that justice be done.

The consequence of a refusal to frame the compromis when an agreement to arbitrate is made can be seen at once by a reference to the second paragraph of the proposition relating to contract debts.

[*Proposition of the United States of America concerning the Treatment of Contractual Debts*]

In order to prevent armed conflicts between nations, of a purely pecuniary origin, growing out of contract debts claimed from the government of one country by the government of another country as due to its nationals, the signatory powers agree not to resort to armed force for the collection of such contract debts.

This stipulation, however, shall not apply when the debtor state rejects or ignores a proposal of arbitration, or, in case of acceptance, makes it impossible to establish the compromis, or, after arbitration, fails to comply with the award.

It is further agreed that the arbitration here considered shall conform to the procedure provided in Chapter III of the Convention for the Pacific Settlement of International Disputes adopted at The Hague, and that it will determine, in so far as the parties should not have agreed thereupon, the validity and amount of the debt and the time and mode of settlement.[1]

The third paragraph of this same document shows the reason for the provisions of the present article, because the convention of 1899 fails to provide any machinery for the establishment of the compromis when the parties fail to agree. It would seem as advisable as it is advantageous to resort to the court rather than to run the risks of armed intervention. But it must be borne in mind that the provision of the article only applies if the offer of arbitration made by one party has been accepted by the other. Recourse to the court is permissive, not obligatory. This provision is not applicable if its acceptance is conditioned upon the compromis being established by some other method. The provision has no retroactive effect and looks only to the future, and if a party litigant desires that the delegation shall have nothing to do with the settlement of the compromis, it may, by virtue of this special clause, exclude the delegation.

The third paragraph of Article 19 is general in its nature and applies to the general treaty of arbitration concluded or renewed after the present convention goes into effect. If the parties have stipulated in the treaty that a compromis be framed, it is for the parties to determine either in the treaty or at some subsequent period the exact terms of the compromis. If the parties have explicitly excluded the delegation without providing another method for the establishment of the compromis, or if they have implicitly excluded the delegation by providing another method for the formulation of the compromis, the delegation is incompetent. If the parties have provided in the

[1] For text as finally adopted, see Appendix, pp. 185–187. On the subject of contract debts, see General Porter's address, *ante*, pp. 25–33.

treaty a particular form of compromis, or if they have intrusted with its negotiation a particular tribunal or individual, then the court is incompetent, unless a new agreement, superseding the old one, be made. And, finally, in order that the optional nature may clearly appear, the article does not content itself with designating some machinery other than the court, but provides that the court shall be incompetent if it is explicitly excluded.

In the last sentence of the paragraph the power and right are expressly reserved to the state in controversy to reject the intervention of the court, if it should appear that the international difference does not properly belong to the category of questions to be submitted to obligatory arbitration. Or, in other words, if, in the opinion of the defendant, the case is not included in the arbitration treaty, or, if included, it falls under the reservations concerning vital interests or honor, the mere suggestion of their existence and presence in the controversy excludes the intervention of the court. It appears therefrom that the will of the state is free and untrammeled, and that the provisions of the article, while they may be a great aid to the parties litigant, cannot in any way be considered as a restriction of their freedom. In a word, the delegation is competent to prepare the compromis, if the parties litigant, who always possess the right to frame it, have not excluded its competence in the matter of contract debts or in any other case.

ARTICLE 20. Each of the parties concerned may nominate a judge of the court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be intrusted to persons other than the judges of the court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the powers appointing them.

The present article is in reality composed of three parts. The first is of a general nature and permits each party to the controversy to add a judge of the court to the delegation.

The second provides that if the delegation acts as a commission of inquiry, each party litigant may add an additional member, who shall be chosen either within or without the court, leaving the party unrestricted liberty of choice.

In the third place it is stipulated that the persons so added, not being members of the court, shall be compensated by those who have appointed them. Let us consider each in turn.

As frequently stated, the purpose of the delegation is to determine smaller cases with accuracy and dispatch. But it may happen that the case is of sufficient interest to justify the intervention of a larger body. In such case either party would be free to select a judge from the court to act with the delegation until the case under question was disposed of. The delegation would then consist of five persons, still a small but more considerable body. Doubt was expressed whether the persons so added should take part in the formation of the judgment or whether they should merely assist the judges in reaching a conclusion. Upon reflection it was felt that a judge should always act as a judge, not as an expert; and that if added to the delegation he could not, without derogation of his functions, be denied the right to take part in the judgment while a member of the delegation.

The question whether the delegation might act as a commission of inquiry has already been dealt with in Article 18, and it is therefore unnecessary to discuss whether it is advisable or inexpedient that the delegation as such should perform the duties of commissions of inquiry. The question involved is whether or not the delegation sitting as a commission of inquiry should be enlarged by the presence of other persons, and if so, whether those persons should be chosen within or without the court. The peculiar nature of the questions submitted to a commission of inquiry furnishes the answer. A commission of inquiry is not a judicial body. It is not necessarily composed of judges, and, even if it were, these judges find the facts of the case without deducing therefrom legal responsibility. If it be, for instance, a question of fact concerning an accident upon the high seas, it would seem that the judges would be much aided by the presence of naval experts; that the experts so added should form an integral part of the delegation sitting as a commission, and should take part in the determination, because judicial training is not essential where no legal judgment is pronounced.

The question naturally arises, Shall the parties adding members to the delegation compensate them in proportion to the services rendered? If the added members are judges of the court, all thought of compensation is excluded, because while sitting with the delegation they merely

perform judicial duties for which they are already compensated. If the added member is not a judge of the court, he should neither expect nor receive compensation except from the party whose representative he is for the time being. Therefore the last paragraph provides that "the traveling expenses and remuneration to be given the said persons are fixed and borne by the powers appointing them."

The provision concerning expenses was added in response to certain inquiries made in the committee, and in order to prevent any doubt or uncertainty that might arise. M. Kriege's brief explanation to the committee is so conclusive and in point as to justify quotation from the minutes without addition or modification:

It is advisable to distinguish two possible contingencies. If the parties call upon the judges of the court, the community shall bear the expense, because it is the intention of the authors to place the whole court at the disposal of those who wish to resort to it. If, on the contrary, they look beyond the court and choose judges or experts, the parties themselves shall defray the expenses involved in their choice.

ARTICLE 21. The contracting powers only may have access to the judicial arbitration court set up by the present convention.

The question involved in this article is one of policy, for if all parties, whether signatory or nonsignatory, were admitted freely to the court, neither the character nor the jurisdiction of the court would be altered. The authors of the project, upon the suggestion of his Excellency M. Asser, thought that the court should be established and open to the signatory powers, and that to allow nonsignatory powers to avail themselves of the court would throw an additional and unjustifiable financial burden upon the powers supporting the court. But it should be borne in mind, as stated by the president (M. Bourgeois), that the term "contracting powers" likewise includes those who may subsequently adhere to the convention. The committee concurred in the views expressed by the article, which was adopted without further observation.

ARTICLE 22. The judicial court of arbitration follows the rules of procedure laid down in the Convention for the Pacific Settlement of International Disputes, except in so far as the procedure is laid down in the present convention.

It seems unnecessary to comment upon this article, for it would be difficult to express more concisely and clearly the idea which inspired

it. It may, however, be said that the article offers an additional evidence of the relation between the proposed court and the Permanent Court of Arbitration. The rules of the procedure devised by the convention of July 29, 1899, are applicable to and binding upon the proposed court, unless the present convention shall expressly or indirectly modify them.

ARTICLE 23. The court determines what language it will itself use and what languages may be used before it.

This article deals with a single but important detail. If it be intended that the judge and agent shall understand one another, it is necessary that the language used be either common to or understood by both. In the amendments to the convention of 1899 it is provided that the parties litigant shall determine the language or languages to be used in the court of arbitration. In an international court, composed of a large number of judges, it is evident that the imposition of any one language might greatly embarrass or even work a hardship upon the judges. The parties litigant must therefore accept the language or languages prescribed by the court.

ARTICLE 24. The international bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, paragraph 2, of the Convention for the Pacific Settlement of International Disputes.

This article was justified by M. Kriege, on behalf of the authors of the project, in the following manner :

Under Article 39 of the convention of 1899 the acts and documents produced by the parties are to be communicated to the members of the tribunal of arbitration in the form and within the periods fixed by the tribunal. Pursuant to a resolution of the Committee of Examination C, this provision will be modified so that in a general way the compromis will contain stipulations as to form and time in which the communication shall take place. This rule, however, does not appear to be applicable to proceedings before a court consisting of a large number of judges. It will be preferable to order that the international bureau shall serve as a channel for all communications to be made to the judges of the court.

To this statement it seems unnecessary to add anything.

ARTICLE 25. For all notices to be served, in particular on the parties, witnesses, or experts, the court may apply direct to the government of the state on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The court is equally entitled to act through the power on whose territory it sits.

Notices to be given to parties in the place where the court sits may be served through the international bureau.

This article is conceived in the desire to aid the court in the largest measure possible in the performance of its judicial duties. It is taken, with slight modifications, from the revised project for the commissions of inquiry elaborated by Committee of Examination A. The last paragraph has been added in order to bring the article into harmony with the prize court convention, which contains similar provisions.

The essence of the article consists in the fact that the signatory powers pledged themselves to cooperate with the court in order to inform parties, witnesses, and experts who may reside in different countries and to whom the notifications are to be addressed. It was thought advisable to permit the court to address itself directly to the governments in order to avoid the delay incident to transmission through diplomatic channels. Should, however, the latter course be deemed preferable, the court may request the appropriate organ of the government in whose territory the court or the delegation is sitting to act in its behalf. It may happen, however, that this intervention might affect injuriously the sovereignty or the security of the power upon which the request is made. Suppose, for example, a state secret be involved. If such be the case, it follows necessarily that that power should have the right to refuse without exposing itself to criticism, for it should be the sole judge whether or not its interests are affected by the proposed communication. It is readily understood that these applications necessarily involve some expense, and it is reasonable to provide that the outlay be fully reimbursed; but as the request is in the interest of justice, it should not be made a source of revenue.

Finally, the project provides for notice to be given to the parties in the place where the court holds its session, and in such case the notices shall be served by the international bureau. It is difficult to see wherein these provisions are subject to criticism. They do indeed bind states to perform certain services, but the signatory powers bind themselves by signing the convention, and undertake in advance to

comply with requests of this nature that may be made upon them. It is in the interest of the community of nations that the states thus voluntarily take upon themselves a certain burden. There will be noticed in the wording of paragraph 2 a slight modification, purely formal and intended only to make the intent and meaning of the text clearer.

ARTICLE 26. The discussions are under the control of the president or vice president, or, in case they are absent and cannot act, of the senior judge present.

The judge appointed by one of the parties cannot preside.

The first paragraph calls for no comment. The last paragraph supposes that the judge of a party litigant may be president, vice president, or president *pro tempore*. In any of these cases he should yield the presidency during the trial of the controversy, because the impartiality of the proceedings might be questioned if a subject or citizen of a party litigant wielded the influence which naturally belongs to the presidency.

ARTICLE 27. The court considers its decisions in private, and the proceedings are secret.

All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

The deliberations of the court are and should be secret, lest outside influence might in some way make itself felt. Only the results of the deliberations, that is to say, the determination of the case, have an interest for the public.

The decision of the court is reached by a majority of the judges present, without taking into consideration the judges who may happen to be absent. Should no majority exist, that is to say, if the court is evenly divided, some means must be provided to produce a majority and thus reach a decision. Were a preponderating influence given to the presiding officer, this might enhance the authority of the office to such a degree as to endanger in certain circumstances the fair and impartial administration of justice. It was therefore thought preferable to secure the requisite majority by discarding the vote of the judge last in the order of precedence established by Article 4, paragraph 1. This method has the advantage of giving the court the benefit of the skill and experience of the judge whose vote is not counted, inasmuch

as he takes part in the trial as well as in the formulation of the judgment.

ARTICLE 28. The judgment of the court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

The first clause of this article seems sufficiently clear without explanation and will doubtless prove satisfactory. A difference of opinion exists whether the names of the judges should be mentioned who dissent from the judgment of the court. Some undoubtedly believe that a judge who does not concur with the majority has a right to have the fact of his dissent recorded, even although he does not deliver a dissenting opinion. On the other hand, many competent authorities believe that a statement of dissent would tend to weaken the judgment by showing that the opinion was not unanimous. The authors of the project were unwilling to decide this delicate question. They contented themselves with the provision that the names of the judges taking part in the proceedings shall be mentioned, without indicating concurrence or dissent. In order to prevent the implication of assent or dissent, it is provided that the judgments and decrees of the court are to be signed by president and clerks. The president's signature does not imply concurrence in the judgment: it merely guarantees the genuineness of the judgment, in the same way that the signature of the clerk or clerks guarantees the authenticity of the official copy of the judgment.

ARTICLE 29. Each party pays its own costs and an equal share of the costs of the trial.

The original project did not contain this article, which was added upon the suggestion of his Excellency M. de Martens, in order that there should be no doubt of the obligation of the parties litigant to meet the costs in the case other than those which fall under the head of general expenses.

ARTICLE 30. The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

The first paragraph indicates in no uncertain way that the delegation is an integral part of the court, and, as such, the procedure of the court must apply to and be followed by the judges sitting as a delegation.

The second paragraph seeks to avoid a deadlock caused by equality of vote in the delegation. Article 20, it will be recalled, permits each party litigant to add a judge or another member of the delegation. Should both avail themselves of that provision, the judges thus designated would stand upon a basis of perfect equality.

If only one of the parties should avail itself of this right, there is no reason why the vote of the judge so added should not be counted. If, however, there were an even division of votes, it seemed to the authors of the project inadvisable to make the decision turn upon the fortuitous presence of a judge who is not a regular member of the court. In such a case the vote will not be counted.

ARTICLE 31. The general expenses of the court are borne by the contracting powers.

The administrative council applies to the powers, to obtain the funds requisite for the working of the court.

In the absence of a definite composition of the court and the ascertainment of the degrees in which the signatory powers shall be represented in the court, it seems useless to attempt to determine the proportion in which the expenses will be borne. Suffice it to say, that the expenses should be borne by the signatory powers, since the institution is created for their benefit: *cujus est commodum, ejus est periculum.*

The final paragraph of the article is purely formal and self-explanatory.

ARTICLE 32. The court itself draws up its own rules of procedure, which must be communicated to the contracting powers.

After the ratification of the present convention the court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the delegation.

Article 22 states that the court shall follow the rules of procedure prescribed by the convention of July 20, 1899, except as otherwise provided in the present convention.

The provisions of the convention of 1899 and of Title II of the present convention are general in their nature. This may seem to be a lack of provision, but it was thought advisable to lay down certain general principles of procedure and to permit the court to frame its rules of court according as circumstances and experience might dictate. In any case the court should communicate to the signatory powers its rules when framed, so that litigants may know in advance the rules to be observed and followed in the conduct of cases.

The second paragraph looks for as early a session after the ratification of the convention as possible. This is imperative because, until the court meets and organizes, it cannot be ready for the determination of cases. Its rules of procedure can only be properly prepared in the presence of and with the cooperation of the judges. The president and the vice president must be elected, not in advance, but by the judges themselves when they assemble, and the delegation could not well be chosen in advance. It is necessary, therefore, that the court should meet at as early a moment as possible after the ratification of the convention, in order to perfect its organization, to frame its rules of procedure, and to prepare for exchange of views. This would be in itself a justification for the assembling of the court, and would give the judges ample employment for that leisure which it is claimed they will enjoy, at least in the first session of their existence.

ARTICLE 33. The court may propose modifications in the provisions of the present convention concerning procedure. These proposals are communicated through the Netherland government to the contracting powers, which will consider together as to the measures to be taken.

While Article 32 makes the court competent to determine its rules, it was not thought advisable to permit it to modify the provisions of the present convention concerning procedure. It was felt that the amendments to be made to the general procedure should be the result of experience, and should therefore be suggested merely as experience shows it is necessary or advisable. The court, however, is a judicial body, not a legislature, and the proposed modifications neither could nor should take effect until they had been communicated to the signatory powers and approved by them. What concerns all should be the work of all.

ARTICLE 34. The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory powers.

ARTICLE 35. The convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland government, which will inform the other powers.

The denunciation shall only have effect in regard to the notifying power. The convention shall continue in force as far as the other powers are concerned.

These dispositions are wholly of a formal nature and do not seem to need explanation or comment.

We do not conceal from ourselves the fact that our work still presents gaps and difficulties. It is hardly necessary to call attention to the absence, in the project, of provisions for the constitution of the court and the selection of the judges. These questions were discussed at great length in the committee, but no solution acceptable to all the states represented could be found. It is to be hoped that an agreement will soon be reached in this respect, and, prompted by this hope, the committee declared itself in favor of the following resolution :

The conference recommends to the signatory powers the adoption of the project it has voted for the establishment of a court of arbitral justice, and its putting into effect as soon as an agreement shall have been reached upon the selection of the judges and the constitution of the court.

Our aim, gentlemen, has been not merely to build the beautiful façade for the Palace of International Justice ; we have erected, indeed furnished, the structure, so that the judges have only to take their places upon the bench. It is for you to open the door ; it is for the governments to usher them in. There can be no doubt that suitors, filled with a sense of deference and security, will appear before this imposing Areopagus in such numbers as to demonstrate that the judicial settlement of international disputes has ceased to be the formula of the future by becoming that of the present.

APPENDIX

I. THE DISPATCH OF SEÑOR LUÍS M. DRAGO, MINISTER OF FOREIGN RELATIONS OF THE ARGENTINE REPUBLIC, TO SEÑOR MARTÍN GRACÍA MÉROU, MINISTER OF THE ARGENTINE REPUBLIC TO THE UNITED STATES[1]

Buenos Aires, December 29, 1902

Mr. Minister:

I have received your excellency's telegram of the 20th instant concerning the events that have lately taken place between the Government of the Republic of Venezuela and the Governments of Great Britain and Germany. According to your excellency's information the origin of the disagreement is, in part, the damages suffered by subjects of the claimant nations during the revolutions and wars that have recently occurred within the borders of the Republic mentioned, and in part also the fact that certain payments on the external debt of the nation have not been met at the proper time.

Leaving out of consideration the first class of claims for the adequate adjustment of which it would be necessary to consult the laws of the several countries, this Government has deemed it expedient to transmit to your excellency some considerations with reference to the forcible collection of the public debt suggested by the events that have taken place.

At the outset it is to be noted in this connection that the capitalist who lends his money to a foreign state always takes into account the resources of the country and the probability, greater or less, that the obligations contracted will be fulfilled without delay.

All governments thus enjoy different credit according to their degree of civilization and culture and their conduct in business transactions; and these conditions are measured and weighed before making any loan, the terms being made more or less onerous in accordance with the precise data concerning them, which bankers always have on record.

In the first place the lender knows that he is entering into a contract with a sovereign entity, and it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it, since this manner of collection would compromise its very existence and cause the independence and freedom of action of the respective government to disappear.

[1] *Foreign Relations of the United States*, 1903, pp. 1–4.

Among the fundamental principles of public international law which humanity has consecrated, one of the most precious is that which decrees that all states, whatever be the force at their disposal, are entities in law, perfectly equal one to another, and mutually entitled by virtue thereof to the same consideration and respect.

The acknowledgment of the debt, the payment of it in its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments, together with all the functions inherent in them, by the mighty of the earth. The principles proclaimed on this continent of America are otherwise. "Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force," said the illustrious Hamilton. "They confer no right of action contrary to the sovereign will."

The United States has gone very far in this direction. The eleventh amendment to its Constitution provided in effect, with the unanimous assent of the people, that the judicial power of the nation should not be extended to any suit in law or equity prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. The Argentine Government has made its Provinces indictable, and has even adopted the principle that the nation itself may be brought to trial before the supreme court on contracts which it enters into with individuals.

What has not been established, what could in no wise be admitted, is that, once the amount for which it may be indebted has been determined by legal judgment, it should be deprived of the right to choose the manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein.

This is in no wise a defense for bad faith, disorder, and deliberate and voluntary insolvency. It is intended merely to preserve the dignity of the public international entity which may not thus be dragged into war with detriment to those high ends which determine the existence and liberty of nations.

The fact that collection can not be accomplished by means of violence does not, on the other hand, render valueless the acknowledgment of the public debt, the definite obligation of paying it.

The state continues to exist in its capacity as such, and sooner or later the gloomy situations are cleared up, resources increase, common aspirations of equity and justice prevail, and the most neglected promises are kept.

The decision, then, which declares the obligation to pay a debt, whether it be given by the tribunals of the country or by those of international arbitration, which manifest the abiding zeal for justice as the basis of the political relations of nations, constitutes an indisputable title which can not be compared to the uncertain right of one whose claims are not recognized, and who sees himself driven to appeal to force in order that they may be satisfied.

As these are the sentiments of justice, loyalty, and honor which animate the Argentine people and have always inspired its policy, your excellency will understand that it has felt alarmed at the knowledge that the failure of Venezuela to meet the payments of its public debt is given as one of the determining causes of the capture of its fleet, the bombardment of one of its ports, and the establishment of a rigorous blockade along its shores. If such proceedings were to be definitely adopted they would establish a precedent dangerous to the security and the peace of the nations of this part of America.

The collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the governments of the countries on which it is imposed.

Such a situation seems obviously at variance with the principles many times proclaimed by the nations of America, and particularly with the Monroe doctrine, sustained and defended with so much zeal on all occasions by the United States, a doctrine to which the Argentine Republic has heretofore solemnly adhered.

Among the principles which the memorable message of December 2, 1823, enunciates, there are two great declarations which particularly refer to the serepublics, viz.: "The American continents are henceforth not to be considered as subjects for colonization by any European powers," and ". . . with the governments . . . whose independence we have . . . acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States."

The right to forbid new colonial dominions within the limits of this continent has been many times admitted by the public men of England. To her sympathy is due, it may be said, the great success which the Monroe doctrine achieved immediately on its publication. But in very recent times there has been observed a marked tendency among the publicists, and in the various expressions of European opinion to call attention to these countries as a suitable field for future territorial expansion. Thinkers of the highest order have pointed out the desirability of turning in this direction

the great efforts which the principal powers of Europe have exerted for the conquest of sterile regions with trying climates and in remote regions of the earth. The European writers are already many who point to the territory of South America, with its great riches, its sunny sky, and its climate propitious for all products, as, of necessity, the stage on which the great powers, who have their arms and implements of conquest already prepared, are to struggle for the supremacy in the course of this century.

The human tendency to expansion, thus inflamed by the suggestions of public opinion and the press, may, at any moment, take an aggressive direction, even against the will of the present governing classes. And it will not be denied that the simplest way to the setting aside and easy ejectment of the rightful authorities by European governments is just this way of financial interventions — as might be shown by many examples. We in no wise pretend that the South American nations are, from any point of view, exempt from the responsibilities of all sorts which violations of international law impose on civilized peoples. We do not nor can we pretend that these countries occupy an exceptional position in their relations with European powers, which have the indubitable right to protect their subjects as completely as in any other part of the world against the persecutions and injustices of which they may be the victims. The only principle which the Argentine Republic maintains and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial situation may compel some one of them to postpone the fulfillment of its promises. In a word, the principle which she would like to see recognized is: that the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.

The loss of prestige and credit experienced by states which fail to satisfy the rightful claims of their lawful creditors brings with it difficulties of such magnitude as to render it unnecessary for foreign intervention to aggravate with its oppression the temporary misfortunes of insolvency.

The Argentine Government could cite its own example to demonstrate the needlessness of armed intervention in these cases.

The payment of the English debt of 1824 was spontaneously resumed by her after an interruption of thirty years, occasioned by the anarchy and the disturbances which seriously affected the country during this period,

and all the back payments and all the interest payments were scrupulously made without any steps to this end having been taken by the creditors.

Later on a series of financial happenings and reverses completely beyond the control of her authorities compelled her for the moment to suspend the payment of the foreign debt. She had, however, the firm and fixed intention of resuming the payments as soon as circumstances should permit, and she did so actually some time afterwards, at the cost of great sacrifices, but of her own free will and without the interference or the threats of any foreign power. And it has been because of her perfectly scrupulous, regular, and honest proceedings, because of her high sentiment of equity and justice so fully demonstrated, that the difficulties undergone, instead of diminishing, have increased her credit in the markets of Europe. It may be affirmed with entire certainty that so flattering a result would not have been obtained had the creditors deemed it expedient to intervene with violence at the critical financial period, which was thus passed through successfully. We do not nor can we fear that such circumstances will be repeated.

At this time, then, no selfish feeling animates us, nor do we seek our own advantage in manifesting our desire that the public debt of states should not serve as a reason for an armed attack on such states. Quite as little do we harbor any sentiment of hostility with regard to the nations of Europe. On the contrary, we have maintained with all of them since our emancipation the most friendly relations, especially with England, to whom we have recently given the best proof of the confidence which her justice and equanimity inspire in us by intrusting to her decision the most important of our international questions, which she has just decided, fixing our limits with Chile after a controversy of more than seventy years.

We know that where England goes civilization accompanies her, and the benefits of political and civil liberty are extended. Therefore, we esteem her, but this does not mean that we should adhere with equal sympathy to her policy in the improbable case of her attempting to oppress the nationalities of this continent which are struggling for their own progress, which have already overcome the greatest difficulties and will surely triumph — to the honor of democratic institutions. Long, perhaps, is the road that the South American nations still have to travel. But they have faith enough and energy and worth sufficient to bring them to their final development with mutual support.

And it is because of this sentiment of continental brotherhood and because of the force which is always derived from the moral support of a whole people that I address you, in pursuance of instructions from His

Excellency the President of the Republic, that you may communicate to the Government of the United States our point of view regarding the events in the further development of which that Government is to take so important a part, in order that it may have it in mind as the sincere expression of the sentiments of a nation that has faith in its destiny and in that of this whole continent, at whose head march the United States, realizing our ideals and affording us examples.

Please accept, etc.,

Luís M. Drago

II. THE CONVENTION FOR THE LIMITATION OF THE EMPLOYMENT OF FORCE FOR THE RECOVERY OF CONTRACT DEBTS[1]

His Majesty the German Emperor, King of Prussia; etc.:

Being desirous of avoiding between nations armed conflicts of a pecuniary origin, arising from contract debts which are claimed from the government of one country by the government of another country as due to its nationals,

Have resolved to conclude a convention to this effect, and have appointed the following as their plenipotentiaries:

[Names of plenipotentiaries]

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

ARTICLE 1. The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration fails to submit to the award.

ARTICLE 2. It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague convention for the pacific settlement of international disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.

ARTICLE 3. The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the powers taking part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the Netherland Government and accompanied by the instrument of ratification.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 620–622; Scott's *Texts of the Peace Conferences at The Hague, 1899, 1907*, pp. 193–198.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be sent immediately by the Netherland Government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to the other powers which have adhered to the convention. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE 4. Nonsignatory powers may adhere to the present convention.

The power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion,which shall be deposited in the archives of the said Government.

The said government shall forward immediately to all the other powers invited to the Second Peace Conference a duly certified copy of the notification, as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 5. The present convention shall come into force, in the case of the powers which were a party to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, in the case of the powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

ARTICLE 6. In the event of one of the contracting powers wishing to denounce the present convention, the denunciation shall be notified in writing to the Netherland Government, which shall immediately communicate a duly certified copy of the notification to all the other powers, informing them at the same time of the date on which it was received.

The denunciation shall only have effect in regard to the notifying power, and one year after the notification has reached the Netherland Government.

ARTICLE 7. A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 3, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 4, paragraph 2) or of denunciation (Article 6, paragraph 1) were received.

Each contracting power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the plenipotentiaries have appended their signatures to the present convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent to the contracting powers through the diplomatic channel.[1]

[1] On April 17, 1908, the Senate of the United States, in executive session, advised and consented as follows to the ratification of the convention respecting the limitation of the employment of force for the recovery of contract debts, signed October 18, 1907:

"*Resolved further*, as a part of this act of ratification, that the United States approves this convention with the understanding that recourse to the Permanent Court for the settlement of the differences referred to in said convention can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute."

III. THE AMERICAN PROJECT OF INTERNATIONAL ARBITRATION[1]

ARTICLE 1. Differences of a judicial nature or relating to the interpretation of treaties existing between two or more contracting states, which may hereafter arise among them and which can not be settled through diplomatic channels, shall be referred to the permanent court of arbitration established at The Hague by the convention of July 29, 1899, provided, however, that they shall not involve either the vital interests, independence or honor of any one of the said states and that they shall not affect the interest of other states not parties to the difference.

ARTICLE 2. Each signatory power shall have the right to judge whether the difference that may have arisen involves its vital interests, independence or honor and is consequently such as to be included among those which under the preceding article are excepted from compulsory arbitration.

ARTICLE 3. In each particular case the high contracting parties (the signatory powers) shall draw up a special compromis (special protocol) in accordance with the constitutions or the laws of the high contracting parties (signatory powers), clearly defining the point in dispute, the scope of the powers of the arbitrators, and the procedure and formalities to be observed as regards the constitution of the arbitral tribunal.

ARTICLE 4. The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

There shall be drawn up a *procès-verbal* of the deposit of each ratification whereof a copy duly authenticated shall be delivered through diplomatic channels to all the powers represented at the international peace conference at The Hague.

ARTICLE 5. Each high contracting party shall have the right of denouncing the convention. The denunciation may be made either so as to imply a complete withdrawal of the denouncing power from the convention or so as to go into effect only as regards a power designated by the denouncing power. In both cases the convention shall continue in effect as long as it shall not have been denounced.

Denunciation, either total or special, shall not go into effect until six months after notice shall have been given in writing to the government of the Netherlands and immediately communicated by the said government to all the other contracting powers.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, p. 884.

IV. THE ANGLO-AMERICAN DRAFT CONVENTION OF INTERNATIONAL ARBITRATION[1]

The project of the Committee of Examination, slightly modified by the commission, was, in translated form, as follows:

ARTICLE 16 *a*. Differences of a legal nature and, primarily, those relating to the interpretation of treaties existing between two or more of the contracting nations, which may arise between them in the future and which cannot be settled by diplomatic means, shall be submitted to arbitration, on condition, however, that they do not involve the vital interests, independence, or honor of either of the said nations, and that they do not affect the interests of other nations not concerned in the dispute.

ARTICLE 16 *b*. It shall devolve upon each of the Signatory Powers to judge whether the difference which has arisen involves its vital interests, independence, or honor, and, consequently, is of such a nature as to be comprised among those which, according to the preceding article, are excepted from compulsory arbitration.

ARTICLE 16 *c*. The high contracting parties recognize that certain of the differences contemplated in Article 16 are of a nature to be submitted to arbitration without the reservations mentioned in Article 16 *a*.

ARTICLE 16 *d*. Following out this idea, they agree to submit the following differences to arbitration:

I. Disputes concerning the interpretation and application of conventional stipulations relative to the following matters:

1. Reciprocal gratuitous aid to indigent sick.
2. International protection of workingmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of vessels.
6. Wages and estates of deceased sailors.
7. Protection of literary and artistic works.

II. Pecuniary claims on account of injuries, when the principle of indemnity is recognized by the parties.

ARTICLE 16 *e*. The high contracting parties decide besides to annex to the present convention a protocol enumerating:

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 537–541; Scott's *Hague Peace Conferences of 1899 and 1907*, Vol. I, pp. 369–373.

1. The other matters which appear to them to be susceptible at present of forming the subject of an arbitral stipulation without reserve;

2. The Powers which, on condition of reciprocity, undertake this engagement among themselves right now with regard to one or more of these matters.

The protocol shall also specify the conditions under which may be added the other matters recognized subsequently as capable of forming the subject of arbitral stipulations without reserve, as well as the conditions under which the non-signatory Powers will be permitted to adhere to the present agreement.[1]

ARTICLE 16*f*. If all the nations signing one of the conventions referred to in Articles 16 *c* and 16 *d* are parties to a dispute concerning the interpretation of the convention, the arbitral award shall have the same weight as the convention itself and shall be likewise observed.

If, on the contrary, the dispute arises only between certain ones of the Signatory Nations, the parties at variance shall notify in due time the Signatory Powers, which shall be entitled to take part in the proceedings.

The award shall be communicated to the Signatory Nations which have not taken part in the proceedings. If the latter declare unanimously in favor of accepting the interpretation of the point in dispute as given in the award, this interpretation shall be binding on all and shall have the same force as the convention itself. In the contrary case, the award shall have

[1] *Protocol referred to in Article 16 e of the British Proposition relating to Compulsory Arbitration.*

ARTICLE 1. Each Power signing the present Protocol accepts arbitration without reserve for disputes concerning the interpretation and application of conventional stipulations relating to those of the matters enumerated in the annexed table which are indicated by the letter A in the column bearing its name. It declares to contract this engagement with respect to each of the other Signatory Powers whose reciprocity in this regard is indicated in the same manner in the table.

ARTICLE 2. Each Power shall always have the privilege of announcing its acceptance of the matters enumerated in the table and for which it has not previously accepted arbitration without reserve according to the provisions of the foregoing article. For this purpose it shall communicate with the Netherlands Government, which shall announce the acceptance to the International Bureau at The Hague. After having inscribed it in the table referred to in the foregoing article, the International Bureau shall at once communicate certified copies of the notification and of the table thus completed, to the Governments of all the Signatory Powers.

ARTICLE 3. Two or more of the Signatory Powers, acting in common accord, may besides address the Netherlands Government, requesting it to inscribe in the table additional matters for which they are ready to accept arbitration without reserve in accordance with Article 1.

The inscription of these additional matters and the communication to the governments of the Signatory Powers of the notification as well as of the corrected text of the table shall take place in the manner provided in the foregoing article.

ARTICLE 4. The nonsignatory Powers shall be permitted to adhere to the present protocol by notifying the Netherlands Government of the matters inscribed in the table for which they are ready to accept arbitration without reserve in accordance with Article 1.

force only as between the parties at variance, or as regards the Powers which shall formally accept the decision of the arbitrators.

ARTICLE 16 *g*. The procedure to be followed in recording adhesions to the principle established by the award in the case contemplated in paragraph 3 of the preceding article, shall be as follows:

In case of a convention establishing a Union with a special bureau, the parties which have taken part in the suit shall transmit the text of the award to the special bureau through the medium of the nation in whose territory the bureau is located. The bureau shall word the text of the article of the convention in conformity with the award, and shall communicate it through the same channel to the Signatory Powers which have not taken part in the suit. If the latter unanimously accept the text of the article, the bureau shall draw up a record of such acceptance, of which a certified copy shall be transmitted to all the Signatory Nations.

If it is not a question of a convention establishing a Union with a special bureau, the said functions of the special bureau shall be performed, in this respect, by the International Bureau of The Hague through the medium of the Government of the Netherlands.

It is strictly understood that the present provision in no wise affects arbitration clauses already contained in existing treaties.

ARTICLE 16 *h*. In each particular case the Signatory Powers shall conclude a special act (agreement to arbitrate) in conformity with the respective constitutions or laws of the Signatory Powers, determining clearly the object of the litigation, the extent of the powers of the arbitrators, the procedure, and the periods to be observed as far as the constitution of the arbitral court is concerned.

ARTICLE 16 *i*. It is understood that provisions regarding arbitration which appear in treaties already concluded or to be concluded shall remain in force.

ARTICLE 16 *k*. The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The ratification of each Signatory Power shall specify the cases enumerated in Article 16 *d* in which the ratifying Power does not avail itself of the provisions of Article 16 *a*.

A record of each ratification shall be drawn up, of which a certified copy shall be sent through diplomatic channels to all the Powers which were represented at the International Peace Conference at The Hague.

A Signatory Power may, at any time, deposit new ratifications comprising additional cases included in Article 16 *d*.

ARTICLE 16 *l*. Each of the Signatory Powers shall have the power to denounce the convention. This denunciation may be made either in such a way as to imply the total withdrawal of the denouncing Power from the convention, or so as to take effect only with respect to a Power designated by the denouncing Power.

This denunciation may likewise be made with regard to one or more of the cases enumerated in Article 16 *d* or in the protocol referred to in Article 16 *e*.

The convention shall continue to exist so long as it is not renounced.

A denunciation, whether general or with respect to a particular Power, shall not take effect until six months after notice thereof has been given in writing to The Netherlands Government and communicated immediately by the latter to all the other contracting Powers.

V. *QUESTIONNAIRE* CONCERNING THE INTERNATIONAL COURT OF PRIZE[1]

1. Is there any reason for instituting an international jurisdiction of appeal in prize cases?

2. Shall the eventual jurisdiction decide only as between the belligerent state to which the captor belongs and the state appearing as claimant for its subjects injured by the capture, or can direct application be made to it by private persons alleging injury?

3. Should this jurisdiction take cognizance of all prize cases or only of such cases in which the interests of neutral governments or private persons may be involved?

4. At what stage in the proceedings shall the international institution assume jurisdiction?

Can the case be brought before it as soon as the national tribunals of first instance shall have rendered their judgments as to the validity of the capture, or must action be deferred until a final sentence shall have been rendered in the state of the captor?

5. Shall this international jurisdiction be permanent in character or shall it be constituted only on the outbreak of war?

6. Whether the jurisdiction be temporary or permanent what elements are to enter into its composition? Shall it be composed of jurists designated by the nations having a merchant marine of a tonnage to be later determined, or of admirals and jurists, members of the Permanent Court of Arbitration, designated by the belligerents and neutral states?

Would it be appropriate in the specific case to exclude judges belonging to the nationality of the interested parties?

7. What principles of law shall the high international court apply?

8. Is it desirable to regulate the order and mode of production of evidence before the high court?

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, p. 1078.

VI. THE CONVENTION FOR THE ESTABLISHMENT OF AN INTERNATIONAL COURT OF PRIZE[1]

His Majesty the German Emperor, King of Prussia; etc.:

Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of national prize courts;

Considering that, if these courts are to continue to exercise their functions in the manner determined by national legislation it is desirable that in certain cases an appeal should be provided, under conditions conciliating, as far as possible, the public and private interests involved in matters of prize;

Whereas, moreover, the institution of an international court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object;

Convinced, finally, that in this manner the hardships consequent on naval war would be mitigated; that, in particular, good relations will be more easily maintained between belligerents and neutrals and peace better assured;

Desirous of concluding a convention to this effect, have appointed the following as their plenipotentiaries:

[Names of plenipotentiaries]

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

Part I. General Provisions

Article 1. The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present convention when neutral or enemy property is involved.

Article 2. Jurisdiction in matters of prize is exercised in the first instance by the prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Article 3. The judgments of national prize courts may be brought before the international Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral power or individual;

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 668–679; Scott's *Texts of the Peace Conferences at The Hague of 1899 and 1907*, pp. 288–317.

2. When the judgment affects enemy property and relates to:

a. Cargo on board a neutral ship;

b. An enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim;

c. A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

ARTICLE 4. An appeal may be brought:

1. By a neutral power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that power (Article 3, 2, *b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, 1), subject, however, to the reservation that the power to which he belongs may forbid him to bring the case before the court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, 2, except that mentioned in paragraph *b*.

ARTICLE 5. An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral states or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest.

The same rule applies in the case of persons belonging either to neutral states or to the enemy, who derive their rights from and are entitled to represent a neutral power whose property was the subject of the decision.

ARTICLE 6. When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts can not deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

ARTICLE 7. If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article 3, 2, *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the court will enforce the enactment.

The court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

ARTICLE 8. If the court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the court shall determine the compensation to be given to the owner on this account.

If the national court pronounced the capture to be null, the court can only be asked to decide as to the damages.

ARTICLE 9. The contracting powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II. CONSTITUTION OF THE INTERNATIONAL PRIZE COURT

ARTICLE 10. The International Prize Court is composed of judges and deputy judges, who will be appointed by the contracting powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present convention.

ARTICLE 11. The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the convention for the pacific settlement of international disputes of the 29th July, 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 12. The judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of

their appointment was received (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

The deputy judges when acting are assimilated to the judges. They rank, however, after them.

ARTICLE 13. The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE 14. The court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 15. The judges appointed by the following contracting powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other contracting powers sit by rota as shown in the table annexed to the present convention; their duties may be performed successively by the same person. The same judge may be appointed by several of the said powers.

ARTICLE 16. If a belligerent power has, according to the rota, no judge sitting in the court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

ARTICLE 17. No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge or deputy judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

ARTICLE 18. The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if, as the result of this last provision more than one power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

ARTICLE 19. The court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

ARTICLE 20. The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the court is sitting or while they are carrying out duties conferred upon them by the court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the court dealt with in Article 47, and are paid through the International Bureau established by the convention of the 29th July, 1899.

The judges may not receive from their own government or from that of any other power any remuneration in their capacity of members of the court.

ARTICLE 21. The seat of the International Prize Court is at The Hague, and it can not, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents.

ARTICLE 22. The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only representatives of contracting powers will be members of it.

ARTICLE 23. The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as Registrar.

The necessary secretaries to assist the Registrar, translators, and shorthand writers are appointed and sworn in by the court.

ARTICLE 24. The court determines which language it will itself use and what languages may be used before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the court.

ARTICLE 25. Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 26. A private person concerned in a case will be represented before the court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the contracting states, or a lawyer practicing before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

ARTICLE 27. For all notices to be served, in particular on the parties, witnesses, or experts, the court may apply direct to the government of the state on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the power applied to under its municipal law allow. They can not be rejected unless the power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The court is equally entitled to act through the power on whose territory it sits.

Notices to be given to parties in the place where the court sits may be served through the International Bureau.

PART III. PROCEDURE IN THE INTERNATIONAL PRIZE COURT

ARTICLE 28. An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

ARTICLE 29. If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will immediately inform the national court, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 30. In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

ARTICLE 31. If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.

Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the court can, after hearing the respondent, grant relief from the effect of the above provision.

ARTICLE 32. If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the court to the respondent.

ARTICLE 33. If, in addition to the parties who are before the court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph 3, the government who has received notice of an appeal has not announced its decision, the court will await before dealing with the case the expiration of the period laid down in Articles 28 or 30.

ARTICLE 34. The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the court.

ARTICLE 35. After the close of the pleadings, a public sitting is held on a day fixed by the court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on their own initiative, in order that supplementary evidence may be obtained.

ARTICLE 36. The International Court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or more of the members of the court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the court outside the territory where it is sitting, the consent of the foreign government must be obtained.

ARTICLE 37. The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 38. The discussions are under the control of the President or Vice-President, or, in case they are absent or can not act, of the senior judge present.

The judge appointed by a belligerent party can not preside.

ARTICLE 39. The discussions take place in public, subject to the right of a government who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the President and Registrar, and these minutes alone have an authentic character.

ARTICLE 40. If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the

period fixed by the court, the case proceeds without that party, and the court gives judgment in accordance with the material at its disposal.

ARTICLE 41. The court officially notifies to the parties decrees or decisions made in their absence.

ARTICLE 42. The court takes into consideration, in arriving at its decision, all the facts, evidence, and oral statements.

ARTICLE 43. The court considers its decision in private and the proceedings are secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.

ARTICLE 44. The judgment of the court must give the reasons on which it is based. It contains the names of the judges taking part in it, and also of the assessors, if any; it is signed by the President and Registrar.

ARTICLE 45. The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

ARTICLE 46. Each party pays its own costs.

The party against whom the court decides bears, in addition, the costs of the trial, and also pays 1 per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE 47. The general expenses of the International Prize Court are borne by the contracting powers in proportion to their share in the composition of the court as laid down in Article 15 and in the annexed table. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the powers for the funds requisite for the working of the court.

ARTICLE 48. When the court is not sitting the duties conferred upon it by Article 32, Article 34, paragraphs 2 and 3, Article 35, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three judges appointed by the court. This delegation decides by a majority of votes.

ARTICLE 49. The court itself draws up its own rules of procedure, which must be communicated to the contracting powers.

It will meet to elaborate these rules within a year of the ratification of the present convention.

ARTICLE 50. The court may propose modifications in the provisions of the present convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the contracting powers, which will consider together as to the measures to be taken.

PART IV. FINAL PROVISIONS

ARTICLE 51. The present convention does not apply as of right except when the belligerent powers are all parties to the convention.

It is further fully understood that an appeal to the International Prize Court can only be brought by a contracting power or the subject or citizen of a contracting power.

In the cases mentioned in Article 5, the appeal is only admitted when both the owner and the person entitled to represent him are equally contracting powers or the subjects or citizens of contracting powers.

ARTICLE 52. The present convention shall be ratified and the ratifications shall be deposited at The Hague as soon as all the powers mentioned in Article 15 and in the table annexed are in a position to do so.

The deposit of the ratifications shall take place, in any case, on the 30th June, 1909, if the powers which are ready to ratify furnish nine judges and nine deputy judges to the court, qualified to validly constitute a court. If not, the deposit shall be postponed until this condition is fulfilled.

A minute of the deposit of ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the powers referred to in the first paragraph.

ARTICLE 53. The powers referred to in Article 15 and in the table annexed are entitled to sign the present convention up to the deposit of the ratifications contemplated in paragraph 2 of the preceding article.

After this deposit, they can at any time adhere to it, purely and simply. A power wishing to adhere notifies its intention in writing to the Netherland Government transmitting to it, at the same time, the act of adhesion, which shall be deposited in the archives of the said Government. The latter shall send, through the diplomatic channel, a certified copy of the notification and of the act of adhesion to all the powers referred to in the preceding paragraph, informing them of the date on which it has received the notification.

ARTICLE 54. The present convention shall come into force six months from the deposit of the ratifications contemplated in Article 52, paragraphs 1 and 2.

The adhesions shall take effect sixty days after notification of such adhesion has been received by the Netherland Government, or as soon as possible on the expiration of the period contemplated in the preceding paragraph.

The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts at any time after the deposit of the ratifications or of the receipt of the notification of the adhesions. In such cases, the period fixed in Article 28, paragraph 2, shall only be reckoned from the date when the convention comes into force as regards a power which has ratified or adhered.

ARTICLE 55. The present convention shall remain in force for twelve years from the time it comes into force, as determined by Article 54, paragraph 1, even in the case of powers which adhere subsequently.

It shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified in writing, at least one year before the expiration of each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other contracting powers.

Denunciation shall only take effect in regard to the power which has notified it. The convention shall remain in force in the case of the other contracting powers, provided that their participation in the appointment of judges is sufficient to allow of the composition of the court with nine judges and nine deputy judges.

ARTICLE 56. In case the present convention is not in operation as regards all the powers referred to in Article 15 and the annexed table, the Administrative Council shall draw up a list on the lines of that article and table of the judges and deputy judges through whom the contracting powers will share in the composition of the court. The times allotted by the said table to judges who are summoned to sit in rota will be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the judges of the court in each year shall be the same. If the number of deputy judges is greater than that of the judges, the number of the latter can be completed by deputy judges chosen by lot among those powers which do not nominate a judge.

The list drawn up in this way by the Administrative Council shall be notified to the contracting powers. It shall be revised when the number of these powers is modified as the result of adhesions or denunciations.

The change resulting from an adhesion is not made until the 1st January after the date on which the adhesion takes effect, unless the adhering power is a belligerent power, in which case it can ask to be at once represented in the court, the provision of Article 16 being, moreover, applicable if necessary.

When the total number of judges is less than eleven, seven judges form a quorum.

ARTICLE 57. Two years before the expiration of each period referred to in paragraphs 1 and 2 of Article 55 any contracting power can demand a modification of the provisions of Article 15 and of the annexed table, relative to its participation in the composition of the court. The demand shall be addressed to the Administrative Council, which will examine it and submit to all the powers proposals as to the measures to be adopted. The powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, and at least one year and thirty days before the expiration of the said period of two years, communicated to the power which made the demand.

When necessary, the modifications adopted by the powers shall come into force from the commencement of the new period.

In faith whereof the plenipotentiaries have appended their signatures to the present convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the powers designated in Article 15 and in the table annexed.

ANNEX TO ARTICLE 15

DISTRIBUTION OF JUDGES AND DEPUTY JUDGES BY COUNTRIES FOR EACH YEAR OF THE PERIOD OF SIX YEARS

JUDGES	DEPUTY JUDGES
First Year	
1 Argentina	Paraguay
2 Colombia	Bolivia
3 Spain	Spain
4 Greece	Roumania
5 Norway	Sweden
6 Netherlands	Belgium
7 Turkey	Persia
Second Year	
1 Argentina	Panama
2 Spain	Spain
3 Greece	Roumania
4 Norway	Sweden
5 Netherlands	Belgium
6 Turkey	Luxemburg
7 Uruguay	Costa Rica
Third Year	
1 Brazil	Santo Domingo
2 China	Turkey
3 Spain	Portugal
4 Netherlands	Switzerland
5 Roumania	Greece
6 Sweden	Denmark
7 Venezuela	Haiti
Fourth Year	
1 Brazil	Guatemala
2 China	Turkey
3 Spain	Portugal
4 Peru	Honduras
5 Roumania	Greece
6 Sweden	Denmark
7 Switzerland	Netherlands
Fifth Year	
1 Belgium	Netherlands
2 Bulgaria	Montenegro
3 Chile	Nicaragua
4 Denmark	Norway
5 Mexico	Cuba
6 Persia	China
7 Portugal	Spain
Sixth Year	
1 Belgium	Netherlands
2 Chile	Salvador
3 Denmark	Norway
4 Mexico	Ecuador
5 Portugal	Spain
6 Servia	Bulgaria
7 Siam	China

VII. THE AMERICAN PROJECT FOR A PERMANENT COURT OF ARBITRATION[1]

I. A Permanent Court of Arbitration shall be organized, to consist of fifteen judges of the highest moral standing and of recognized competency in questions of international law. They and their successors shall be appointed in the manner to be determined by this Conference, but they shall be so chosen from the different countries that the various systems of law and procedure and the principal languages shall be suitably represented in the personnel of the court. They shall be appointed for —— years, or until their successors have been appointed and have accepted.

II. The Permanent Court shall convene annually at The Hague on a specified date and shall remain in session as long as necessary. It shall elect its own officers and, saving the stipulations of the convention, it shall draw up its own regulations. Every decision shall be reached by a majority, and nine members shall constitute a quorum. The judges shall be equal in rank, shall enjoy diplomatic immunity, and shall receive a salary sufficient to enable them to devote their time to the consideration of the matters brought before them.

III. In no case (unless the parties expressly consent thereto) shall a judge take part in the consideration or decision of any case before the court when his nation is a party therein.

IV. The Permanent Court shall be competent to take cognizance and determine all cases involving differences of an international character between sovereign nations, which it has been impossible to settle through diplomatic channels and which have been submitted to it by agreement between the parties, either originally or for review or revision, or in order to determine the relative rights, duties or obligations in accordance with the finding, decisions, or awards of commissions of inquiry and specially constituted tribunals of arbitration.

V. The judges of the Permanent Court shall be competent to act as judges in any Commission of Inquiry or Special Tribunal of Arbitration which may be constituted by any Power for the consideration of any matter which may be specially referred to it and which must be determined by it.

VI. The present Permanent Court of Arbitration might, as far as possible, constitute the basis of the court, care being taken that the Powers which recently signed the Convention of 1899 are represented in it.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, pp. 1031–1032; Scott's *Hague Peace Conferences of 1899, and 1907*, pp. 821–822.

VIII. THE PROJECT FOR A PERMANENT COURT OF ARBITRATION DRAFTED BY THE AMERICAN DELEGATION UPON WHICH THE JOINT PROJECT OF GERMANY, GREAT BRITAIN, AND THE UNITED STATES WAS BASED

ARTICLE 1. With the object of facilitating an immediate recourse to arbitration for international differences which could not be settled by diplomatic methods, the signatory Powers undertake to organize a Permanent Court of Arbitration accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with the rules of procedure included in the present convention.

ARTICLE 2. The Permanent Court of Arbitration shall be composed of fifteen (sixteen) persons possessing the qualifications required for judges in their respective countries, and who shall be of known competency in questions of international law.

The judges of the Permanent Court of Arbitration shall hold office for the period of . . . . (six) years, or until their successors are appointed and qualify.

The judges of the Permanent Court of Arbitration herein provided for shall be chosen as far as practicable from the list of members comprising the existing court.

ARTICLE 3. In case of the expiration of the term of office, death, resignation, inability to act, or failure to qualify, of any judge, the vacancy shall be filled by the State or group of States having the right to appoint the said judge and in accordance with the provisions of the article governing appointments. The successor so appointed shall be, if practicable, selected from the list of members of the existing Court of Arbitration.

ARTICLE 4. The judges of the permanent Court of Arbitration shall be appointed and sworn, or shall otherwise qualify, according to the law of their respective States regulating the duties and obligations of judicial officers. The appointment, acceptance and oath of, office taken by the judge shall be certified to the Administrative Council by the appointing State. The commissions of the judges of the Permanent Court of Arbitration shall be in the form prescribed by the Administrative Council and the judges so commissioned shall be accredited to the said Council.

ARTICLE 5. In no case (unless the party in controversy shall expressly consent thereto) shall a judge participate in the consideration or discussion of any matter before the Permanent Court of Arbitration in which his state is a party.

ARTICLE 6. Each judge of the Permanent Court of Arbitration shall, during his term of office, receive an annual compensation of —— to be borne by the signatory Powers in the proportion established for the International Bureau of the Universal Postal Union.

The salary herein specified shall be paid by the International Bureau at the expiration of each six months from the date of the opening of the Permanent Court of Arbitration at the Hague.

The judges of the Permanent Court of Arbitration shall be reimbursed by the International Bureau for the necessary traveling expenses upon the approval of the Administrative Council.

No judge or officer of the Permanent Court of Arbitration shall receive from his own or any other State any compensation or allowance for his services on the Permanent Court or Special Arbitration, Commission of inquiry, or any matter whatever connected with the exercise of his duties as judge of the Permanent Court of Arbitration.

ARTICLE 7. The court shall meet annually at the Hague (on the third Wednesday in June) and shall remain in session for a period of sixty days and such longer time as shall be necessary for the disposal of business before it.

Nine judges of the Permanent Court of Arbitration shall constitute a quorum for the transaction of business and all decisions shall be by a majority vote of those present and participating.

The Permanent Court of Arbitration may adjourn to a fixed date, or it may adjourn to re-assemble upon the call of the President in order to consider or receive matters which may be presented for its consideration.

ARTICLE 8. The judges of the Permanent Court of Arbitration shall be of equal rank, and be entitled to diplomatic immunity. They shall choose a presiding judge from among their number and they shall be seated according to the date of their respective commissions.

The presiding judge shall be the President of the Permanent Court of Arbitration, and in the performance of his duties shall exercise no greater authority and prerogatives than the judges of the Permanent Court, unless such have been specifically conferred upon him by the judges of said court.

ARTICLE 9. The International Bureau of the Court of Arbitration of the Hague shall serve as the Secretariat of the Permanent Court of Arbitration. It shall have custody of the archives and of the proceedings of the Permanent Court of Arbitration.

All communications between the Permanent Court of Arbitration and the Powers, except those made in open court, shall be through the International Bureau.

ARTICLE 10. The Permanent Court of Arbitration shall make rules of

procedure not inconsistent with nor prescribed by the Convention for the Peaceful Settlement of International Differences.

ARTICLE 11. The Permanent Court of Arbitration shall be competent to receive, consider and determine any claim or petition from a sovereign state touching any difference of an international character with another sovereign state which diplomacy has failed to settle, provided however that such difference is not political in character and does not involve the honor, independence or vital interests of any state.

It shall also be competent to receive and consider any application from a sovereign state to review and revise or determine the relative rights, duties and liabilities under the findings rendered within one year by any Commission of Inquiry or Special Arbitration between sovereign States to which the petitioning State was a party.

ARTICLE 12. The Permanent Court of Arbitration shall not be competent to receive or consider any petition, application or communication whatever from any person natural or artificial except a sovereign State nor shall it be competent to receive any application or petition from any sovereign State unless it relates exclusively to a difference of an international character with another State, which diplomacy has failed to settle and which is not political in character and does not affect the honor, independence or vital interests of any State.

ARTICLE 13. The Permanent Court of Arbitration shall not take any action on any petition or application which it is competent to receive unless it shall be of the opinion that a justiciable case, and one which it is competent to entertain and decide and worthy of its consideration, has been brought before it, in which case it may in not less than thirty or more than ninety days after presentation of the petition invite the other sovereign State to appear and submit the matter to judicial determination by the court.

In the latter event the State so invited may (*a*) refuse to submit the matter, (*b*) refrain from submitting the matter by failing for —— days to make any response to the invitation, in which event it shall be deemed to have refused to submit the matter; (*c*) submit the matter in whole, or (*d*) offer to submit the matter in part or in different form from that stated in the petition in which event the petitioning state shall be free either to accept the qualified submission or to withdraw its petition or application, and shall signify its election within a time to be determined by the Court; (*e*) appear for the sole purpose of denying the right of the petitioning State to any redress or relief on the petition or application presented, — that is to say, it may except or demur; in case the Court does not sustain this it shall renew the invitation to appear and submit the matter.

ARTICLE 14. In case, however, the States in controversy cannot agree upon the form and scope of the submission of the difference referred to in

the petition, the Court of Arbitration may appoint, upon the request by either party, a Committee of Three from the members of the Administrative Council, none of whom shall represent the States involved, without suggestion from either party, and the Committee thus constituted shall frame the questions to be submitted and the scope of the inquiry and thereafter if either party shall withdraw it shall be deemed to have refused to submit the matter involved to judicial or arbitral determination.

ARTICLE 15. The Administrative Council shall transmit to every signatory Power a copy of every petition which may be submitted to the Permanent Court of Arbitration and any Power affected thereby shall have the right to present through the Administrative Council any matter bearing on the question involved which it sees fit to do, and any matter so presented shall be transmitted by the Administrative Council to every signatory Power.

ARTICLE 16. An agreement to submit a controversy to, or appearance and submission of the case in the Permanent Court of Arbitration implies an obligation to submit in good faith to the decision of the court on the question submitted.

ARTICLE 17. After a controversy has been submitted the court may determine whether the testimony shall be taken by the court or by a commission and in the latter case the court may delegate one or more of its judges or appoint commissioners to take the testimony; and, on consent of the parties, the court may direct where, when and how the testimony shall be taken and in what proportion the expense shall be borne, disbursed and apportioned; but except as otherwise stipulated, or in case the parties cannot agree, the procedure in taking testimony shall be the same as provided in Chapter —— of the convention for the Pacific Settlement of International Disputes relating to commissions of inquiry, except that the testimony shall be transmitted to the court without expressions of opinion.

ARTICLE 18. If two Powers agree to submit a difference to the Permanent Court of Arbitration and desire a summary hearing and determination, they may request a special detail either of three or of five judges and may select the judges to compose the detail by striking alternately from the list of judges an equal number until the desired number shall remain.

Powers desiring to form a Commission of Inquiry for a particular purpose may resort to the Permanent Court of Arbitration and constitute the Commission in the above-described manner, and add thereto an equal number of Nationals from each of the parties:

ARTICLE 19. The judges of the Permanent Court of Arbitration may constitute the division of the High Court of Prize established by Chapter —— of this convention.

The personnel of the division of the High Court may be modified to meet the regulations and requirements of the convention creating the Court of Prize.

IX. SUGGESTED COMPOSITION OF THE COURT OF ARBITRAL JUSTICE PRESENTED BY THE AMERICAN, BRITISH AND GERMAN DELEGATION[1]

TABLE A

Suggested composition of the Court of Arbitral Justice, to consist of seventeen judges, for each year of the period of twelve years, during which the convention shall be in force.

[As Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia were to sit permanently in the court they are omitted from the table and only the countries are given whose judges were to sit in rotation for a longer or shorter period.]

	JUDGES	DEPUTY JUDGES	JUDGES	DEPUTY JUDGES	JUDGES	DEPUTY JUDGES	JUDGES	DEPUTY JUDGES
	1st year		*4th year*		*7th year*		*10th year*	
1	Argentine		Brazil		Argentine		Brazil	
2	Belgium		Chili		Belgium		Chili	
3	Bolivia		Cuba		China		Denmark	
4	China		Denmark		Spain		Greece	
5	Spain		Greece		Honduras		Paraguay	
6	Netherlands		Netherlands		Netherlands		Netherlands	
7	Roumania		Portugal		Roumania		Portugal	
8	Sweden		Siam		Sweden		Siam	
9	Turkey		Turkey		Turkey		Turkey	
	2d year		*5th year*		*8th year*		*11th year*	
1	Argentine		Dominican Republic		Argentine		Spain	
2	Belgium		Ecuador		Belgium		Mexico	
3	China		Spain		China		Norway	
4	Colombia		Mexico		Spain		Netherlands	
5	Spain		Norway				Peru	
6	Netherlands		Netherlands		Netherlands		Salvador	
7	Roumania		Servia		Roumania		Servia	
8	Sweden		Switzerland		Sweden		Switzerland	
9	Turkey		Turkey		Turkey		Turkey	
	3d year		*6th year*		*9th year*		*12th year*	
1	Brazil		Bulgaria		Brazil		Bulgaria	
2	Chili		Spain		Chili		Spain	
3	Costa Rica		Guatemala		Denmark		Mexico	
4	Denmark		Haiti		Spain		Montenegro	
5	Spain		Luxemburg		Greece		Norway	
6	Greece		Mexico		Panama		Persia	
7	Netherlands		Norway		Netherlands		Switzerland	
8	Portugal		Persia		Portugal		Uruguay	
9	Turkey		Switzerland		Turkey		Venezuela	

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. II, pp. 1040–1043; Scott's *Hague Peace Conferences of 1899 and 1907*, pp. 823–825.

TABLE B

The proposed arrangement and distribution of Judges and Deputy Judges among the Powers represented for less than the full period of the convention.

[It is unnecessary to insert the deputy judges of the Powers continually represented because each one of such Powers was to possess a deputy judge for the full period of the Convention.]

	JUDGES	DEPUTY JUDGES		JUDGES	DEPUTY JUDGES
	Years	*Years*		*Years*	*Years*
Spain	10	10	Bolivia	1	1
Netherlands	10	10	Colombia	1	1
Turkey	10	10	Costa Rica	1	1
Argentine	4	4	Cuba	1	1
Belgium	4	4	Dominican Republic	1	1
Brazil	4	4	Ecuador	1	1
Chili	4	4	Guatemala	1	1
China	4	4	Haiti	1	1
Denmark	4	4	Honduras	1	1
Greece	4	4	Luxemburg	1	1
Mexico	4	4	Montenegro	1	1
Norway	4	4	Nicaragua	1	1
Portugal	4	4	Panama	1	1
Roumania	4	4	Paraguay	1	1
Sweden	4	4	Peru	1	1
Switzerland	4	4	Salvador	1	1
Bulgaria	2	2	Uruguay	1	1
Persia	2	2	Venezuela	1	1
Servia	2	2			
Siam	2	2			
	90	90		18	18

X. DRAFT CONVENTION FOR THE ESTABLISHMENT OF THE COURT OF ARBITRAL JUSTICE[1]

PART I. CONSTITUTION OF THE JUDICIAL ARBITRATION COURT

ARTICLE 1. With a view to promoting the cause of arbitration, the contracting powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Judicial Arbitration Court, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of insuring continuity in jurisprudence of arbitration.

ARTICLE 2. The Judicial Arbitration Court is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present convention.

ARTICLE 3. The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the convention for the pacific settlement of international disputes. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

ARTICLE 4. The judges of the Judicial Arbitration Court are equal and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5. The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must swear, before the Administrative Council, or make a solemn affirmation to exercise their functions impartially and conscientiously.

[1] *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, Vol. I, pp. 702–707; Scott's *Texts of the Peace Conferences at The Hague of 1899, and 1907*, pp. 141–154.

ARTICLE 6. The court annually nominates three judges to form a special delegation and three more to replace them should the necessity arise. They may be reëlected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its President, who, in default of a majority, is appointed by lot.

A member of the delegation can not exercise his duties when the power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 7. A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge can not act as agent or advocate before the Judicial Arbitration Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8. The court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are even, by lot.

ARTICLE 9. The judges of the Judicial Arbitration Court receive an annual salary of 6000 Netherland florins. This salary is paid at the end of each half year, reckoned from the date on which the court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present convention, they receive the sum of 100 florins per diem. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the court dealt with in Article 31, and are paid through the International Bureau created by the convention for the pacific settlement of international disputes.

ARTICLE 10. The judges may not accept from their own government or from that of any other power any remuneration for services connected with their duties in their capacity of members of the court.

ARTICLE 11. The seat of the Judicial Court of Arbitration is at The Hague, and can not be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12. The Administrative Council fulfills with regard to the Judicial Court of Arbitration the same functions as to the Permanent Court of Arbitration.

ARTICLE 13. The International Bureau acts as registry to the Judicial Court of Arbitration, and must place its offices and staff at the disposal of the court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the court.

ARTICLE 14. The court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a power is party in a case actually pending before the court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the court in extraordinary session.

ARTICLE 15. A report of the doings of the court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the court.

ARTICLE 16. The judges and deputy judges, members of the Judicial Arbitration Court, can also exercise the functions of judge and deputy judge in the international prize court.

PART II. COMPETENCY AND PROCEDURE

ARTICLE 17. The Judicial Court of Arbitration is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

ARTICLE 18. The delegation is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the convention for the pacific settlement of international disputes is to be applied;

2. To hold an inquiry under and in accordance with Part III of the said convention, in so far as the delegation is intrusted with such inquiry by the

parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the court or of the delegation itself.

ARTICLE 19. The delegation is also competent to settle the *compromis* referred to in Article 52 of the convention for the pacific settlement of international disputes if the parties are agreed to leave it to the court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of —

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse can not, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 20. Each of the parties concerned may nominate a judge of the court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be intrusted to persons other than the judges of the court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the powers appointing them.

ARTICLE 21. The contracting powers only may have access to the Judicial Arbitration Court set up by the present convention.

ARTICLE 22. The Judicial Court of Arbitration follows the rules of procedure laid down in the convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present convention.

ARTICLE 23. The court determines what language it will itself use and what languages may be used before it.

ARTICLE 24. The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings

provided for in Article 63, paragraph 2, of the convention for the pacific settlement of international disputes.

ARTICLE 25. For all notices to be served, in particular on the parties, witnesses, or experts, the court may apply direct to the government of the state on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The court is equally entitled to act through the power on whose territory it sits.

Notices to be given to parties in the place where the court sits may be served through the International Bureau.

ARTICLE 26. The discussions are under the control of the President or Vice-President, or, in case they are absent or can not act, of the senior judge present.

The judge appointed by one of the parties can not preside.

ARTICLE 27. The court considers its decisions in private, and the proceedings are secret.

All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28. The judgment of the court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the President and registrar.

ARTICLE 29. Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30. The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

ARTICLE 31. The general expenses of the court are borne by the contracting powers.

The Administrative Council applies to the powers to obtain the funds requisite for the working of the court.

ARTICLE 32. The court itself draws up its own rules of procedure, which must be communicated to the contracting powers.

After the ratification of the present convention the court shall meet as early as possible in order to elaborate these rules, elect the President and Vice-President, and appoint the members of the delegation.

ARTICLE 33. The court may propose modifications in the provisions of the present convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting powers, which will consider together as to the measures to be taken.

PART III. FINAL PROVISIONS

ARTICLE 34. The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory powers.

ARTICLE 35. The convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other powers.

The denunciation shall only have effect in regard to the notifying power. The convention shall continue in force as far as the other powers are concerned.

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